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No. 06-

IN THE

Supreme Court of the United States

NDS GROUP PLC; NDS AMERICAS, INC.,
Petitioners,

v.

SOGECABLE, S.A.; CANALSATÉLITE DIGITAL, S.L.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

EUGENIE C. GAVENCHAK
Deputy General Counsel
News Corporation
1211 Avenue of the Americas
New York, New York 10036

DARIN W. SNYDER
(Counsel of Record)
O'MELVENY & MYERS LLP
400 South Hope Street
Los Angeles, California 90071
(213) 430-6000

MARK S. DAVIES
DAVID J. L. MORTLOCK
SUSAN M. MOSS
O'MELVENY & MYERS LLP
1625 Eye Street, NW
Washington, DC 20006

Attorneys for Petitioners

QUESTIONS PRESENTED

1. The Racketeer Influenced and Corrupt Organizations Act ("RICO") makes it "unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate . . . in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." 18 U.S.C. § 1962(c). RICO defines an "enterprise" to include "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4).

The RICO questions presented are:

(a) Whether an "enterprise" may consist solely of a corporate defendant (the "person") and its subsidiaries or agents.

(b) Whether an "enterprise" comprising a "group of individuals associated in fact" must have a structure separate from the "pattern of racketeering activity."

2. Whether the Ninth Circuit should be summarily reversed for holding, contrary to *United States v. Kubrick*, 444 U.S. 111 (1979), that statutes of limitations do not begin to run until an injured person discovers the identity of the defendant.

PARTIES TO THE PROCEEDING

Petitioners are NDS Group PLC and NDS Americas, Inc., defendants-appellees below.

Respondents are Sogecable, S.A. and CanalSatélite Digital, S.L., plaintiffs-appellants below.

CORPORATE DISCLOSURE STATEMENT

Petitioner NDS Americas is a wholly-owned subsidiary of petitioner NDS Group PLC.

Petitioner NDS Group PLC is a publicly traded company. News Corporation is a publicly traded company that owns more than 10% of NDS Group PLC.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners NDS Group PLC and NDS Americas, Inc. (collectively "NDS") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The decision of the court of appeals is unreported but is available at 2006 WL 3698713 and is reprinted in the Appendix to the Petition ("App.") at 1a-5a. The district court's order granting NDS's motion to dismiss the Second Amended Complaint is unreported and is reprinted at App. 6a-29a. The district court's order granting NDS's motion to dismiss the First Amended Complaint is unreported and is reprinted at App. 30a-38a.

JURISDICTION

The court of appeals issued its decision on December 13, 2006. App. 1a. An order denying petitioners' petition for rehearing and rehearing en banc was entered on February 21, 2007. App. 39a. On May 8, 2007, Justice Kennedy granted an extension of time to file a petition for a writ of certiorari to June 11, 2007. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section (c) of 18 U.S.C. § 1962, Prohibited activities, provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of

> racketeering activity or collection of unlawful debt.

Section (3) of 18 U.S.C. § 1961, Definitions, provides:

> "person" includes any individual or entity capable of holding a legal or beneficial interest in property.

Section (4) of 18 U.S.C. § 1961 provides:

> "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.

STATEMENT OF THE CASE

This case presents two related questions about the construction and scope of "enterprise" as used in the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968. Plenary review of those questions is warranted, for the reasons elaborated below. But the case also presents a distinct question as to the proper trigger for the limitations period under the Digital Millennium Copyright Act ("DMCA"), 17 U.S.C. § 1201 *et seq.*, the Federal Communications Act ("FCA"), 47 U.S.C. § 151 *et seq.*, and state tort laws. On that question, the decision below is so unambiguously contrary to this Court's controlling precedent that summary reversal is in order.

The two RICO issues arise from the statute's central liability provision, which makes it unlawful for a "person" to be "associated" with an "enterprise" engaged in a "pattern of racketeering activity." 18 U.S.C. § 1962(c). Plaintiffs allege that NDS Group is a "person" that has violated RICO by "associat[ing]" with a technology "enterprise" consisting of NDS Group, its wholly-owned subsidiary NDS Americas, and certain agents. Plaintiffs also allege that the technology enterprise engaged in a "pattern of racketeering activity."

The district court ruled that plaintiffs failed to allege a RICO "enterprise" because (1) the technology enterprise was "nothing more than a subset" of NDS Group, the alleged RICO person and (2) the technology enterprise, an alleged association in fact, did not have a "structure" separate from the alleged pattern of racketeering activity. The Ninth Circuit reversed, ruling that plaintiffs' allegations satisfy the statutory requirements for a RICO enterprise. The court's ruling implicates two deep splits among the courts of appeals over the meaning of RICO's enterprise requirement.

First, the circuits are divided 3 to 4 to 4 on whether or when a RICO enterprise can include only the RICO person (*i.e.*, the corporate defendant) and its subsidiaries or agents. In *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 164 (2001), the Court noted but did not resolve this question. And, in *Mohawk Industries, Inc. v. Williams*, 546 U.S. 1075 (2005), the Court granted certiorari on this question, held argument, but ultimately dismissed the grant as improvidently granted. *Mohawk Industries, Inc. v. Williams*, 126 S. Ct. 2016 (2006).[1] Today, three circuits — the Sixth, Ninth, and Eleventh — hold that a RICO person and its subsidiaries or agents always constitute an "enterprise" distinct from the RICO "person." Four circuits — the First, Second, Eighth, and Tenth — hold that a RICO person and its subsidiaries or agents can "sometimes" constitute an enterprise. And four circuits — the Third, Fourth, Fifth, and Seventh — properly hold that a RICO person and its subsidiaries or agents can never constitute an enterprise. This Court's guidance remains sorely needed.

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[1] In *Mohawk*, the writ of certiorari presented two questions: (1) Whether a defendant corporation and its agents can constitute an "enterprise" under RICO and (2) Whether allegations that the hourly wages plaintiffs accepted were too low to state proximately caused injuries to business or property under RICO. This Court granted certiorari limited to the first question, the question presented here. After argument, the Court dismissed the limited writ as improvidently granted, and then granted the petition, vacated the lower court's judgment, and remanded the case for consideration in light of *Anza v. Ideal Steel Supply Corp.*, 126 S. Ct. 1991 (2006) (holding that RICO civil plaintiffs must plead an injury directly caused by the RICO predicate acts). 126 S. Ct. 2016 (June 5, 2006).

Second, the courts of appeals are split 5 to 4 on whether a RICO enterprise must have a "structure" that is separate from the alleged pattern of racketeering activity. In *Odom v. Microsoft Corp.*, the Ninth Circuit recently stated that this Court's decision in *United States v. Turkette*, 452 U.S. 576 (1981), has caused "confusion" in the Circuits. No. 04-35468, 2007 WL 1297249, at *8 (9th Cir. May 4, 2007) (en banc). Five circuits — the Third, Fourth, Seventh, Eighth, and Tenth — "have read the language in *Turkette* to require that an associated-in-fact enterprise have some kind of ascertainable separate structure." *Id.* Four other circuits — the First, Sixth, Ninth, and Eleventh — "have rejected any requirement that there be an 'ascertainable structure, separate or otherwise, for an associated-in-fact enterprise.'" *Id.*

Although the decision below adopts two expansive and incorrect views of RICO's "enterprise" requirement, those views at least draw support from decisions by other courts of appeals. But the panel's statute of limitations ruling is literally unprecedented. The court of appeals held that the statutory limitations period begins only when the *identity of the alleged injurer* is discovered, rather than when the injury is discovered. App. 2a-3a. This ruling is contrary to *United States v. Kubrick*, 444 U.S. 111 (1979), a decision expressly rejecting the argument that lack of knowledge of the identity of the injurer prevents the start of the statute of limitations period. Summary reversal is appropriate.

A. Legal Background

The principle RICO provision at issue, 18 U.S.C. § 1962(c), provides: "It shall be unlawful for any person employed by or associated with an enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." Under 18 U.S.C. § 1964(c), any person injured in business or property by reason of a violation of § 1962 may recover treble damages and attorney's fees.

The text provides that only the "person" is liable; the "enterprise" itself is not liable. "[E]nterprise" is defined as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4).

The DMCA and the FCA both import the three-year statute of limitations set out in the Copyright Act. 17 U.S.C. § 507(b). The relevant state statute of limitations is two years. *See Knoell v. Petrovich*, 76 Cal. App. 4th 164, 168 (1999).

B. Factual Background

This matter involves "conditional access technology" for satellite transmissions of movies, television programming, and other media content. Satellite transmissions of media content are necessarily broadcast over large geographic areas that include both subscribers who pay to view the content and potential viewers who have not subscribed. Accordingly, satellite media companies "encrypt" the transmissions so that the programming is not readily viewable. If an individual pays for the programming, the viewer is provided with conditional access technology that unlocks the encryption and permits the subscriber to view the media content.

Petitioners NDS Group PLC and its wholly-owned subsidiary NDS Americas, Inc. (collectively "NDS") are the leading global suppliers of conditional access systems. NDS conditional access software and interactive systems for television systems use "smart cards," plastic credit card-sized devices that contain sophisticated computer chips. To assure that NDS technology remains secure, NDS engages in an aggressive anti-piracy program and routinely submits its own technology and the technology of its competitors to scrutiny for possible security gaps. At the time of the alleged acts, petitioner NDS Group had offices around the world, including a research and development facility in Haifa, Israel. Petitioner NDS Americas performs sales, customer support, marketing, and smart card processing for its parent NDS Group.

Respondents Sogecable, S.A. and its subsidiary, Canal-Satélite Digital, S.L. (collectively "Sogecable"), provide pay satellite television service in Spain. At the time of the events at issue, Sogecable used a conditional access technology supplied by the one of its affiliates, Canal+ Technologies ("Canal+"). Canal+'s "MediaGuard" brand conditional access system also used smart cards that subscribers placed in their television set-top boxes. Each smart card included a read-only memory file ("UserROM") containing code that is part of the system used to unlock Sogecable's programming transmissions.

In March 1999, the Canal+ UserROM was published on the Internet. App. 13a. After the code was published, counterfeit Canal+ smartcards began appearing worldwide. App. 17a. In March 2002, Canal+ sued NDS for allegedly enabling counterfeit Canal+ smart cards. *Groupe Canal+ S.A. et al v. NDS Group PLC et al.*, No. 02-cv-01178 (N.D. Cal. filed Mar. 11, 2002). App. 35a. The Canal+ litigation settled pursuant to an agreement between the parent companies of Canal+ and NDS.

C. Prior Proceedings

1. In July 2003, more than three years after learning that the Canal+ code was posted to the Internet, Sogecable filed this lawsuit. App. 21a. Sogecable's complaint alleges that NDS Group is responsible for the publication of the Canal+ UserROM. App. 7a. (Due to the procedural posture of this case, we assume the accuracy of the facts as alleged by plain-

tiffs, though in fact these allegations are baseless.) In particular, Sogecable alleges that NDS researchers in Israel (the "Haifa Team") extracted the Canal+ UserROM. App. 12a. Among others, NDS hired Oliver Kommerling to help extract the UserROM. Pl. 2d Am Compl. ¶¶ 76, 79, 80. Sogecable further alleges that NDS Group then transmitted this code to an NDS Americas employee, Christopher Tarnovsky. App. 7a. Tarnovsky allegedly transmitted the code to the operator of a Canadian website, and the code was posted on the site. *Id.* Counterfeit smart cards were allegedly manufactured as a result of this posting, allowing Sogecable's customers' access to premium satellite programming while only paying for basic access. *Id.*

Sogecable asserts that these allegations state a RICO claim under Section 1962(c). Sogecable alleges that NDS Group, the RICO "person," formed an "enterprise" and committed a "pattern of racketeering activity" including copyright infringement, misconduct in connection with access devices, and mail and wire fraud. Pl. 2d Am Compl. ¶ 171. In particular, Sogecable alleged a "technology enterprise" purportedly including "the association of NDS Group, the Haifa Team (including Tarnovsky and Kommerling), and NDS Americas." *Id.* ¶ 165.[2]

In addition to RICO, Sogecable alleged violations of the DMCA, the FCA, and asserted state law claims for intentional interference with contract and tortious interference with prospective economic advantage.

2. The district court dismissed the entire complaint. *Sogecable S.A. v. NDS Group PLC*, No. 8:03-cv-01174-DOC-AN (C.D. Cal. Aug. 3, 2004). App. 6a-29a. The court ruled that Sogecable had not adequately pled the existence of a RICO enterprise. App. 25a-28a. The court also ruled that

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[2] Sogecable also alleged a "distribution enterprise," but the allegations there do not implicate the questions presented by this petition.

Sogecable's other claims are barred by the applicable statutes of limitations. App. 8a-24a.

According to the district court, the enterprise allegations are inadequate for two reasons. First, the alleged technology enterprise could not "associate" with the RICO person because it *was* the RICO person. App. 27a-28a. NDS Group is the only defendant named in the RICO count as a RICO "person." App. 28a. The court found that an enterprise comprising NDS Group and its employees and subsidiary is just "NDS Group or a piece of NDS Group." App. 28a. Because the "defendant/person is also NDS Group," the alleged technology enterprise is not distinct enough from the RICO person to "associate" with the person, as the RICO statute requires. *Id.*

The district court also dismissed the RICO claim because the alleged "enterprise" did not have a separate "structure." App. 28a. After citing *Turkette*, the district court noted that the "law of the Ninth Circuit further requires that the 'organization, formal or informal, be an entity separate and apart from the pattern of racketeering activity in which it engages.'" App. 24a (quoting *Chang v. Chen*, 80 F.3d 1293, 1298 (9th Cir. 1996), *overruled in pertinent part by Odom v. Microsoft Corp.*, No. 04-35468, 2007 WL 1297249 (9th Cir. May 4, 2007)). Applying the Ninth Circuit's decision in *Chang*, the court dismissed the complaint because "the important fact remains that the only *structure* that the Technology Enterprise is alleged to have is that of NDS Group itself." App. 28a. (emphasis added). Without any structure separate from NDS Group or the alleged racketeering acts themselves, the technology enterprise could not constitute an "enterprise" under RICO. *Id.*

The district court also ruled in favor of petitioners on the statutes of limitations issues, finding that all of respondents' non-RICO claims were time-barred. App. 8a-24a. The "basic statement of accrual law," the court observed, "is that 'a claim accrues when the plaintiff knows or has reason to know of the injury which is the basis of the action.'" App. 10a. The court concluded that the "claims under the DMCA and FC[A] accrued at least by the time that [Sogecable] noted the counterfeit MediaGuard smart cards began to emerge that 'contained a perfect replica of the complex encryption table.'" App. at 13a. "At this point, 1999, Plaintiffs knew, or reasonably should have known, that someone had distributed the MediaGuard UserROM (a/k/a SECAROM ZIP)." App. at 13a. The district court thus held that the three-year federal statute of limitations expired on December 31, 2002, six months before this July 2003 suit. App. at 20a-21a. The court also found that the statutory limitations period had run for the state law claims because "cards were being sold in Spain by at least July 2000 and the state interference torts only have two year statutes of limitations." App. 13a. The court declined to equitably toll the statutes of limitations, noting that Sogecable conceded it learned of NDS's alleged involvement in March 2002 when Canal+ filed its suit. App. 14a-15a.

3. The Ninth Circuit (Fletcher, B., Fernandez, and Graber, JJ.) reversed. App. 1a-5a.

The court ruled that plaintiffs' technology enterprise allegations properly state a RICO enterprise. NDS Group is the RICO "person." App. 4a. The court noted that the "enterprise consisted of two separate corporations" — NDS Group and its wholly-owned subsidiary, NDS Americas — as well as "the Haifa team," individuals "who appear to be independent contractors" "hired to hack the encryption code." App. 5a. The panel ruled that since NDS Group was not solely "both the RICO person and the RICO enterprise" "there is a distinct RICO enterprise pleaded." App. 5a. Although not expressly addressing the separate structure requirement applied by the district court, the court of appeals reversed the district court and held that plaintiffs adequately pled a RICO enterprise. Thus, the court necessarily rejected the district court's holding that the allegations failed for lack of pleading a separate structure.

The court of appeals also reversed the district court's statutes of limitations ruling. The court did not take issue with the district court's holding that Sogecable knew or should have known of the injury in 1999. Nevertheless, the court held that Sogecable was entitled to bring suit three years from the time (March 2002) Sogecable discovered NDS's alleged involvement. App. 3a-4a. "Thus," the panel concluded, "when Plaintiffs filed suit in July 2003, all of their claims were timely." App. 4a.

REASONS FOR GRANTING THE PETITION

I. THE FEDERAL COURTS OF APPEALS ARE DEEPLY DIVIDED OVER WHETHER A RICO "ENTERPRISE" CAN CONSIST OF ONLY THE RICO PERSON AND ITS SUBSIDIARIES OR AGENTS

This Court has twice recognized the importance of resolving whether an "enterprise" can consist of only the RICO person and its subsidiaries or agents. In *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 161 (2001), the Court held that "to establish liability under § 1962(c) one must allege and prove the existence of two distinct entities: (1) a 'person'; and (2) an 'enterprise' that is not simply the same 'person' referred to by a different name." *Cedric Kushner* involved an employee as the RICO person and his corporate employer as the enterprise. *Ibid.* The Court expressly distinguished the situation in which a "corporation was the 'person' and the corporation, together with all its employees and agents, were the 'enterprise.'" *Id.* at 164 (citing *Riverwoods Chappaqua Corp. v. Marine Midland Bank, N. A.*, 30 F.3d 339, 344 (2d Cir. 1994)). Similarly, the Court also distinguished cases in which the RICO person and the "enterprise" are identical except that the enterprise includes affiliated corporate entities. *Id.* (citing *Discon, Inc. v. NYNEX Corp.*, 93 F.3d 1055, 1064 (2d Cir. 1996), *vacated on other grounds*, 525 U.S. 128 (1998)). The Court explicitly saved the question of whether this type of "oddly constructed entity" is an "enterprise" for a later day: "We do not here consider the merits of these cases, and note only their distinction from the instant case." *Id.*

More recently, this Court again confirmed the importance of resolving the question presented here. The Court granted certiorari on the question of whether "a defendant corporation and its agents can constitute an 'enterprise' under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 ('RICO')." Pet. No. 05-465, filed from *Mohawk Industries, Inc. v. Williams*, 411 F.3d 1252 (11th Cir. 2005), *cert. granted*, *Williams v. Mohawk Indus., Inc.*, 546 U.S. 1075 (2005).[3] After argument, however, the Court dismissed the writ as improvidently granted. *Williams v. Mohawk Industries, Inc.*, 126 S. Ct. 2016 (2006); *see supra* at p. 3, n.1.

As *Cedric Kushner* suggested and the *Mohawk* grant confirmed, the circuit courts are in need of instruction from this Court on the requirement that a RICO enterprise be distinct from the RICO person. This case presents an opportunity for the Court to provide the necessary guidance.

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[3] Although the *Mohawk* question expressly mentions agents and not subsidiaries, courts do not distinguish between whether an enterprise can consist of a RICO person and its agents and whether an enterprise can consist of a RICO person and its subsidiaries. *See, e.g.*, *Fitzgerald v. Chrysler Corp.*, 116 F.3d 225, 228 (7th Cir. 1997) (Posner, J.) (considering whether enterprise consists of the RICO person's "dealers and other agents (or any subset of the members of the corporate family)").

A. Three Circuits Hold That a RICO Person and its Subsidiaries or Agents Always Constitute an Enterprise

In the decision below, the Ninth Circuit applied its rule that a RICO person and its subsidiaries or agents always constitute a RICO enterprise. *See Living Designs, Inc. v. E.I. DuPont de Nemours & Co.*, 431 F.3d 353 (9th Cir. 2005). The alleged RICO "person" in this case is NDS Group. App. 28a. The alleged enterprise includes only NDS Group, its subsidiary (NDS Americas), and its agents (the Haifa Team). App. 5a. The court noted that the "enterprise consisted of two separate corporations" – NDS Group and its wholly-owned subsidiary, NDS Americas – as well as "the Haifa team," individuals "who appear to be independent contractors." App. 5a. The panel ruled that because NDS Group is not solely "both the RICO person and the RICO enterprise," "there is a distinct RICO enterprise pleaded." App. 5a.

The decision below follows the rule adopted by the Ninth Circuit in *Living Designs*. In *Living Designs*, the plaintiffs alleged an enterprise consisting of the corporation "persons" and its agents, and, as here, the district court dismissed the complaint for failure to plead a distinct RICO enterprise. 431 F.3d at 361. Reversing, the court of appeals emphasized that a corporation is formally separate and distinct from its agents. *Id.* at 362. The court explained that a RICO person is always distinct from an enterprise unless "the enterprise cannot be either formally or practically separable from the person." *Id.* (citing *United States v. Benny*, 786 F.2d 1410, 1416 (9th Cir. 1986)).

The Eleventh Circuit also holds that a RICO person and its formally separate subsidiaries or agents always constitute an enterprise. That circuit addressed the question most recently in *Williams v. Mohawk Indus.*, 465 F.3d 1277 (11th Cir. 2006), *cert. denied*, 127 S. Ct. 1381 (2007). In that case, agents (employment recruiters) of the RICO person allegedly formed an enterprise with the RICO person. *Id.* at 1284. The Eleventh Circuit found that an enterprise could consist of the RICO person and its agents. *Id.* at 1284-85. In an earlier case, the court likewise found that a RICO person could consist of an enterprise formed out of the person and its corporate affiliates. *United States v. Goldin Indus., Inc.*, 219 F.3d 1271, 1276 (11th Cir. 2000).

Decisions from the Sixth Circuit also hold that any formal legal distinction between the RICO person and the enterprise suffices. In *Davis v. Mutual Life Ins. Co of NY*, 6 F.3d 367, 377 (6th Cir. 1993), for example, the court held that when the enterprise includes agents of the RICO person, the enterprise and RICO person are "distinct entities." *See also, e.g., Fleischhauer v. Feltner*, 879 F.2d 1290, 1297 (6th Cir. 1989) (allegations of "separate legal entities" suffice to show enterprise separate from RICO person, even when they have a common owner).[4]

B. Four Circuits Hold That a RICO Person and its Subsidiaries or Agents "Sometimes" Constitute an Enterprise

Although not adopting the formalistic rule of the Sixth, Ninth, and Eleventh Circuits, four circuits have held that an enterprise can sometimes include just the RICO person and its agents or subsidiaries. These courts have struggled, however, to establish a clear rule of law.

For example, the First Circuit has held that "in most cases" a RICO person and its subsidiary or agent cannot constitute an enterprise. *Bessette v. Avco Fin. Servs.*, 230 F.3d 439, 449 (1st Cir. 2000), explained: "In most cases, a subsidiary that is under the complete control of the parent company is nothing more than a division of the one entity," so "[w]ithout further allegations [of distinct activities], the mere identification of a subsidiary and a parent in a RICO claim fails the distinctiveness requirement." *Id.*; *see also Compagnie De Reassurance D'ile De France v. New England Reinsurance Corp.*, 57 F.3d 56, 92 (1st Cir. 1995) (RICO person could not associate with the alleged enterprise because it included only a subsidiary of the RICO person with no allegation that the subsidiary took action independent of its parent).

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[4] One panel of the Sixth Circuit has suggested, in dicta, that "a corporation may not be liable under section 1962(c) for participating in the affairs of an enterprise that consists only of its own subdivisions, agents, or members." *Begala v. PNC Bank, Ohio*, 214 F.3d 776, 781 (6th Cir. 2000).

Likewise, the Second Circuit holds that a RICO enterprise may sometimes consist of the RICO person and its subsidiaries or agents. For example, in *Discon, Inc. v. NYNEX Corp.*, 93 F.3d 1055 (2d Cir. 1996), *reversed on other grounds*, 525 U.S. 128 (1998), cited by the Court in *Cedric Kushner*, the Second Circuit held that adding subsidiaries to a RICO person does not necessarily constitute a RICO enterprise. 93 F.3d at 1063. According to the court, if both the alleged RICO person and the alleged RICO enterprise "were acting within the scope of a single corporate structure, guided by a single corporate consciousness," the allegations did not state a RICO enterprise. *Id.* at 1063. The court allowed that the "situation might be different if" the RICO person was not acting within the scope of the enterprise's single corporate consciousness. *Ibid. Accord Riverwoods Chappaqua Corp. v. Marine Midland Bank*, 30 F.3d 339, 344 (2d Cir. 1994) (RICO enterprise cannot consist of a RICO person and its own agents if the agents are "carrying on the regular affairs of the defendant").

Like the First and Second Circuits, the Eighth Circuit sometimes permits an enterprise to consist of the RICO person and its subsidiaries or agents. In *Fogie v. THORN Americas*, 190 F.3d 889 (8th Cir. 1999), the court asked whether "a subsidiary may be sufficiently distinct from its parent or other related subsidiaries so as to satisfy § 1962(c)'s distinctiveness requirement." The court held that it was "not enough" that the parent and subsidiary were "separate legal entities" or had "different roles" in the enterprise. *Id.* at 898. But the court did not hold that a RICO enterprise could never consist solely of the RICO person and its subsidiaries or agents, instead suggesting that such an enterprise could exist if a plaintiff were to make an unspecified "greater showing" of "distinctiveness." *Id.*

The Tenth Circuit also sometimes permits an enterprise to consist of the RICO person and its subsidiaries or agents. In dismissing a RICO claim alleging that the parent of the corporate defendant was the enterprise, the court held that "a plaintiff must, at the very least, allege [that] the parent somehow made it easier to commit or conceal the fraud of which the plaintiff complains." *Brannon v. Boatmen's First Nat'l Bank*, 153 F.3d 1144, 1147 (10th Cir. 1998) (internal quotation marks and citation omitted); *see also Board of County Comm'rs v. Liberty Group*, 965 F.2d 879, 885-86 (10th Cir. 1992) (when RICO person was only "going about its ordinary business" through the alleged enterprise of its employees and agents, enterprise was not distinct).

Although these circuits reject the strict rule that formal separateness between the RICO person and enterprise is not sufficient, the courts have suggested differing formulations of when a RICO enterprise can consist of a RICO person and its subsidiaries or agents. The First Circuit, for example, requires "further allegations" of "independent action" while the Tenth Circuit insists on allegations that "the parent somehow made it easier to commit or conceal the fraud." The Second Circuit looks for variations in "corporate consciousness" while the Eighth Circuit vaguely insists on a "greater showing of distinctness."

C. Four Circuits Correctly Hold That a RICO Person and its Subsidiaries or Agents Never Constitute an Enterprise

In direct conflict with the Sixth, Ninth, and Eleventh Circuits, and in considerable tension with the qualifying statements of the First, Second, Eighth, and Tenth Circuits, four circuits apply a straightforward rule that a RICO enterprise can never consist solely of the RICO person and its subsidiaries or agents. Section 1962(c) makes it unlawful for a RICO "person" to "associate" with an "enterprise" engaged in a pattern of racketeering activity. Consistent with the statutory text, the Third, Fourth, Fifth, and Seventh Circuits hold that the RICO enterprise can never include only the RICO person and its subsidiaries or agents. These courts adopt the sensible view that a RICO "person" cannot "associate" with itself and thus a RICO "enterprise" cannot consist of mere extensions of the RICO person, such as subsidiaries or agents.

The Third Circuit, for example, applies a bright-line rule that a RICO enterprise cannot consist of the RICO person and its subsidiaries or agents. A corporation "cannot be a defendant under section 1962(c) for conducting an 'enterprise' consisting of its own subsidiaries or employees, or consisting of the corporation itself in association with its subsidiaries or employees." *Gasoline Sales v. Aero Oil Co.*, 39 F.3d 70 (3d Cir. 1994), *disapproved on other grounds by Jaguar Cars v. Royal Oaks Motor Car Co.*, 46 F.3d 258 (3d Cir. 1995). The court explained that it has "interpreted corporate identity expansively, so that the actions of a corporation's agents conducting its normal affairs are constructively its own actions for section 1962(c) purposes." *Id.* at 73. Thus, the RICO person "cannot be sued" "for conducting its subsidiaries" in a pattern of racketeering activity because an enterprise cannot consist merely of the RICO person and "itself." *Ibid.*[5]

The leading Fourth Circuit case is *United States v. Computer Sciences Corp.*, 689 F.2d 1181, 1190 (4th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983). There, in ruling that the division of a corporation could not associate with the corporation "person,' the court explained that "'enterprise' was meant to refer to a being different from, *not the same as or part of*, the person whose behavior [RICO] was designed to prohibit. . .." *Id.* at 1190 (emphasis added). *See also NCNB Nat'l Bank v. Tiller*, 814 F.2d 931, 936 (4th Cir. 1987))("[A] 'person' is not distinct from an 'enterprise' when a corporation and its wholly owned subsidiary are involved.").

The Fifth Circuit also does not permit a RICO enterprise to include solely the RICO person and its subsidiaries or agents. In *Khurana v. Innovative Health Care Systems, Inc.*, 130 F.3d 143 (5th Cir. 1997), *vacated on other grounds*, *Teel v. Khurana*, 525 U.S. 979 (1998), the court observed that by plaintiffs pleading combinations of subsidiaries and parents as the person and enterprise, they were attempting to avoid the RICO distinctness requirement. The court held that "[w]hen the alleged association-in-fact is in reality no different from the association of individuals or entities that constitute a defendant 'person' and carry out its activities, the distinctiveness requirement is not met in regard to that defendant." 130 F.3d at 155; *accord Whelan v. Winchester Prod. Co.*, 319 F.3d 225, 229 (5th Cir. 2003) (no RICO enterprise when "a defendant corporation through its agents committed the predicate acts in the conduct of its own business").

In a series of decisions, the Seventh Circuit also has repeatedly held that a RICO enterprise cannot consist solely of a RICO person and its subsidiaries or agents. For example, in *Bachman v. Bear, Stearns & Co.*, 178 F.3d 930, 932 (7th Cir. 1999) (Posner, J.), the court stated: "A firm and its employees, or a parent and its subsidiaries, are not an enterprise separate from the firm itself." Similarly, in *Fitzgerald v. Chrysler Corp.*, 116 F.3d 225, 228 (7th Cir. 1997), the Seventh Circuit held that a RICO enterprise cannot "associate" with a RICO person when the enterprise consists of the RICO person's "dealers and other agents (or any subset of the members of the corporate family)." *Accord Baker v. IBP, Inc.*, 357 F.3d 685 (7th Cir. 2004), *cert. denied*, 543 U.S. 956 (2004) (allegations that the RICO person and its agents are the enterprise "won't fly").

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[5] The Third Circuit has "hypothesized that a 'narrow,' 'theoretical,' and 'rare' exception" to its bright-line rule "might exist." *Id.* at 73. The Third Circuit, however, has yet to find a case that fits this hypothetical exception.

* * *

In granting the petition in *Mohawk*, this Court recognized the need to give the lower courts guidance on whether, and if so, when, an "enterprise" can include solely the RICO person and its subsidiaries or agents. The split remains deep and intolerable: three circuits hold that such allegations always state a RICO enterprise, four circuits have attempted to carve out a "sometimes" position, and four circuits properly hold that an enterprise cannot consist of the RICO person and its subsidiaries or agents. Certiorari should be granted.

II. THE FEDERAL COURTS OF APPEALS ARE DIVIDED 5 TO 4 ON WHETHER "ENTERPRISE" INCLUDES A STRUCTURE REQUIREMENT

This case also presents a second, related, question concerning the meaning of "enterprise" in the RICO statute. RICO defines an "enterprise" to include any "group of individuals associated in fact" and makes it unlawful for any person associated with that enterprise to engage "in the conduct of such enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. §§ 1961(4), 1962(c). The courts of appeals do not agree whether the "pattern of racketeering activity" is sufficient by itself to establish a RICO enterprise or whether a RICO enterprise must also have an ascertainable structure apart from those illegal acts.

The judicial confusion centers on this Court's decision in *United States v. Turkette*, 452 U.S. 576 (1981). In *Turkette*, the Court distinguished the "pattern of racketeering activity" from the "enterprise" engaging in that activity: "The enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct. The pattern of racketeering activity is, on the other hand, a series of criminal acts as defined by the statute." 452 U.S. at 583. "The existence of an enterprise at all times remains a separate element which must be proved by the Government." *Id.*

"The Court's explanation of the meaning of an associated-in-fact enterprise in *Turkette* has not been clearly understood in the lower courts." *Odom v. Microsoft Corp.*, No. 04-35468, 2007 WL 1297249, at *8 (9th Cir. May 4, 2007) (noting deep circuit split on the question). On the one hand, the Third, Fourth, Seventh, Eighth, and Tenth Circuits interpret *Turkette* to require that a RICO plaintiff allege that the enterprise has a "structure" that is separate from that necessary to accomplish the alleged pattern of racketeering activity. On the other hand, the First, Sixth, Ninth, and Eleventh Circuits have expressly rejected a separate structure requirement.

A. Five Circuits Hold That A RICO Enterprise Must Have A Structure Apart From The Pattern Of Racketeering Activity

Following this Court's decision in *Turkette*, the Eighth Circuit reiterated its long-standing rule that a RICO enterprise must have a structure that is different from the pattern of racketeering activity. In *United States v. Bledsoe*, 674 F.2d 647, 663 (8th Cir. 1982), the court explained that "[c]onstruing the [RICO] statute to give effect to all its words, it requires an association with an enterprise which is distinct from participation in the conduct of the enterprise through a pattern of racketeering activity." Indeed, "unless the inclusion of the enterprise element requires proof of some structure separate from the racketeering activity and distinct from the organization which is a necessary incident to the racketeering, the Act simply punishes the commission of two of the specified crimes within a 10 year period." *Id.* at 664. The Eighth Circuit found that Congress intended the Act to apply to structured enterprises engaging in criminal conduct. *Accord United States v. Anderson*, 626 F.2d 1358, 1362 n.4 (8th Cir. 1980); *Asa-Brandt, Inc. v. ADM Investor Servs., Inc.*, 344 F.3d 738, 752 (8th Cir. 2003) ("enterprise must have . . . an ascertainable structure distinct from the pattern of racketeering").

The Third Circuit also requires a RICO plaintiff to allege a structure that is separate from the alleged RICO activity. *United States v. Riccobene*, 709 F.2d 214, 223-24 (3d Cir. 1983). In *Riccobene*, the Third Circuit explained that an "enterprise" must have "an existence beyond that which is necessary merely to commit each of the acts charged as predicate racketeering offenses." *Id.* at 224. Thus, "the government must show that some sort of structure exists within the group for the making of decisions." *Id.* at 222; *accord United States v. Console*, 13 F.3d 641, 651-52 (3d Cir. 1993) (finding the evidence at trial satisfied the "separate structure" requirement when the enterprise "coordinated the commission of multiple predicate offenses," while it "continued to provide legitimate services during the period").

In agreement with *Bledsoe* and *Riccobene*, the Fourth, Seventh, and Tenth Circuits also require the structure of a RICO enterprise to exist separately from its predicate illegal acts. In *United States v. Tillett*, 763 F.2d 628, 632 (4th Cir. 1985), the Fourth Circuit held that proof of an "enterprise" requires a showing "that the organization had an existence beyond that which was necessary to commit the predicate crimes" (citing *Riccobene*, 709 F.2d at 223-24; *Bledsoe*, 674 F.2d at 655). The Seventh Circuit adopted the same position in *Richmond v. Nationwide Cassel L.P.*, 52 F.3d 640, 645 (7th Cir. 1995), explaining that a RICO complaint alleging an enterprise must identify "a structure and goals separate from the predicate acts themselves." *Id.*[6] Similarly, the Tenth Circuit has adopted the majority position of *Bledsoe* and *Riccobene* and concluded that an "enterprise" must have "an ascertainable structure that exist[s] apart from the commission of racketeering acts." *United States v. Sanders*, 928 F.2d 940, 943 (10th Cir. 1991) (noting that "courts have differed in their views of how separate and distinct the existence of the enterprise must be from the underlying pattern of racketeering"); *accord United States v. Smith*, 413 F.3d 1253, 1267 (10th Cir. 2005) ("In other words, the 'enterprise' must not be just the name for the crimes KMD members committed.").

The Third, Fourth, Seventh, Eighth, and Tenth Circuits thus all agree that a RICO claim must include an allegation that the enterprise has a structure that exists apart from the pattern of racketeering activity.

B. Four Circuits Hold That There Is No Structure Requirement

Four circuits have expressly rejected the *Bledsoe-Riccobene* separate structure requirement. In these circuits, proof of an "enterprise" need not be separate from proof of the predicate RICO acts. Within these circuits, the term "enterprise" becomes effectively meaningless because any conspiracy for the commission of the predicate crimes falls within the purview of the RICO statute. *See Bledsoe*, 674 F.2d at 664.

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[6] The Seventh Circuit has again noted that "because a RICO enterprise is more than a group of people who get together to commit a 'pattern of racketeering activity,' there must be an organization with a structure and goals separate from the predicate acts themselves." *Stachon v. United Consumers Club, Inc.*, 229 F.3d 673, 675 (7th Cir. 2000).

The First Circuit has directly rejected the separate structure requirement. In *United States v. Patrick*, 248 F.3d 11, 18 (1st Cir. 2001), the court acknowledged and rejected the Eighth Circuit's *Bledsoe* analysis: "We today explicitly reject the *Bledsoe* test as an additional requirement beyond the *Turkette* instruction." The court declined to "import an 'ascertainable structure' requirement." *Id.* at 19.

The Sixth Circuit has also "specifically rejected" the *Bledsoe* test. *United States v. Collins*, No. 87-1283, 1991 U.S. App. LEXIS 3575, at *41 (6th Cir. Feb. 26, 1991). In *United States v. Qaoud*, 777 F.2d 1105, 1115 (6th Cir. 1985), the court held that an "enterprise" and a "pattern of racketeering activity" could be proved by the same evidence. The Sixth Circuit has since, in multiple unpublished opinions, interpreted the holding in *Qaoud* as a rejection of the separate "ascertainable structure" requirement recognized by *Bledsoe* and the majority of the other circuits. *See, e.g.*, *McNeil v. Salan*, No. 91-2041, 1992 U.S. App. LEXIS 11476, at *10 (6th Cir. May 14, 1992); *Collins*, 1991 U.S. App. LEXIS 3575, at *41.

The Eleventh Circuit addressed the question soon after this Court's decision in *Turkette*. In *United States v. Cagnina*, 697 F.2d 915, 921 (11th Cir. 1983), the Eleventh Circuit sustained its pre-*Turkette* decisions holding that a RICO claim need not allege an enterprise with a structure that is "separable from the pattern of racketeering activity." *Id.* (citing *United States v. Elliott*, 571 F.2d 880 (5th Cir. 1978) (binding on the Eleventh Circuit)). The court noted the Eighth Circuit's holding that an enterprise possess an "'ascertainable structure' distinct from the association necessary to conduct a pattern of racketeering activity" and "expressly acknowledged" that its position was contrary to *Bledsoe*. *Id.*

Joining the First, Sixth, and Eleventh, the en banc Ninth Circuit recently overruled its precedent and rejected the separate structure requirement. At the time the district court below ruled, the Ninth Circuit required proof of a separate structure. In *Chang v. Chen,* 80 F.3d 1293, 1299 (9th Cir. 1996), the court held that, in order to sustain a RICO claim, it is necessary "to show that the organization has an existence beyond that which is merely necessary to commit the predicate acts of racketeering." Under that holding, a claimant needed to show that the organized entity existed to commit "several different predicate offenses and *other activities* on an on-going basis." *Id.* (citing *Riccobene*, 709 F.2d at 224.) The court confirmed its position in *Simon v. Value Behavioral Health, Inc.*, 208 F.3d 1073, 1083-84 (9th Cir. 2000), declaring that "a group does not constitute an enterprise unless it exists independently from the racketeering activity in which it engages." *Id.*

Recently, however, the Ninth Circuit, en banc, wrote: "We take this opportunity to join the circuits that hold that an associated-in-fact enterprise under RICO does not require any particular organizational structure, separate or otherwise." *Odom v. Microsoft Corp.*, No. 04-35468, 2007 WL 1297249, at *9 (9th Cir. May 4, 2007). In so holding, the court expressly overruled both *Simon* and *Chang*, the cases relied on by petitioners and the district court. *Id.* ("To the extent that our past precedent suggests the contrary, it is hereby overruled. *See, e.g., Wagh v. Metris Direct, Inc.*, 348 F.3d 1102, 1112 (9th Cir. 2003); *Simon v. Value Behavioral Health, Inc.*, 208 F.3d 1073, 1083-84 (9th Cir. 2000); *Chang*, 80 F.3d at 1298-99, 1301.").

Reflecting the judicial uncertainty over the question presented, five judges disagreed with the en banc court's interpretation of the RICO enterprise requirement. Noting that the "language in *Turkette* is the starting point," the five Ninth Circuit judges argued that RICO requires "some minimal structure, coordination, or ordering principle to distinguish them from a run-of-the-mill conspiracy." *Id.* at *14 (Silverman, J., concurring on unrelated grounds).

This Court's guidance is plainly necessary to resolve the entrenched and widespread disagreement among the circuits about the requirements to allege a RICO "enterprise."

III. THE NINTH CIRCUIT'S ADOPTION OF AN IDENTITY DISCOVERY RULE SHOULD BE SUMMARILY REVERSED BECAUSE IT DIRECTLY CONFLICTS WITH *UNITED STATES V. KUBRICK*

Separate and apart from its rulings on the RICO issues, the court of appeals also held that the statutory limitations period for purposes of DMCA, FCA, and state common law claims begins only when the identity of the alleged injuror is discovered. That "identity-discovery" rule is contrary to *United States v. Kubrick*, 444 U.S. 111 (1979), and other precedents of this Court. Those precedents hold that the limitations period is triggered at the earliest when the plaintiff discovers its injury, not when it discovers the identity of the defendant.

The "standard rule" for calculating a limitations period is that the period commences when the plaintiff has a complete cause of action. *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp.*, 522 U.S. 192, 201 (1997); *Clark v. Iowa City*, 87 U.S. 583, 589 (1875) ("all statutes of limitation begin to run when the right of action is complete"); *TRW Inc. v. Andrews*, 534 U.S. 19, 39 (2001) (Scalia, J., concurring) ("a statute of limitations begins to run when the cause of action is complete"). Limitations statutes reflect a legislative judgment that "the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Order of R.R. Telegraphers v. Railway Express Agency*, 321 U.S. 342, 349 (1944). *See, e.g.*, *Rotella v. Wood*, 528 U.S. 549, 559 (2000) ("A limitations period that would have begun to run only eight years after a claim became ripe would bar repose, prove a godsend to stale claims, and doom any hope of certainty in identifying potential liability."). A limitations defense, therefore, is a "meritorious defense, in itself serving the public interest." *Guar. Trust Co. v. United States*, 304 U.S. 126, 136 (1938).

In a few specific instances, the Court has recognized that a plaintiff who does not immediately "discover" the "injury" is entitled to additional time to file suit. In cases of fraud (*Holmberg v. Armbrecht*, 327 U.S. 392 (1946)) and latent disease (*Urie v. Thompson*, 337 U.S. 163 (1949)), the Supreme Court has approved a discovery rule that starts the limitations period only when the plaintiff learns (or should have learned) of the fraud or disease. Even in those limited instances where the Court has adopted a "discovery" rule, however, the Court has not postponed the start of the limitations period to the time when plaintiff discovers the source of the injury or the identity of the injurer.

In *Kubrick*, this Court squarely rejected the argument that the narrow exception of the discovery rule should be extended to apply when the injured person knows of the injury but not its source. There, plaintiff was treated for a leg infection with an antibiotic and soon thereafter suffered loss of hearing. 444 U.S. at 118. A few years later, plaintiff learned that the antibiotic may have caused his hearing loss. *Ibid.* The Court held that the statute of limitations began to run when the plaintiff learned of the hearing loss. *Ibid.* In so holding, the Court rejected the court of appeals' ruling that the statute of limitations did not begin running "until [plaintiff] knows or should suspect that the [defendant] who caused his injury was legally blameworthy." *Id.* at 119. The Court was "unconvinced that for statute of limitations purposes a plaintiff's ignorance of his legal rights and his ignorance of the fact of his injury or its cause should receive identical treatment." *Id.* at 122. Unlike a plaintiff who does not know of his injury, a plaintiff who is aware of his injury but merely not aware of his "legal rights" has ample "prospect[s]" for timely bringing suit. *Ibid.* The plaintiff could have, for example, sought the advice of a "competent doctor" once he suffered the loss of hearing. *Ibid.* Thus, there was no sound reason to extend the time to file suit based on his lack of knowledge that the antibiotics caused the injury.

The facts of this case are on all fours with *Kubrick*, but the court below reached the opposite result. As in *Kubrick*, the plaintiffs here were well aware of the "fact of injury" — the publication of the UserROM and distribution of counterfeit cards — and the court of appeals, like the lower court in *Kubrick*, granted the plaintiffs additional time to sue because they claim not to have been aware that NDS was "legally blameworthy" for the injury. But, as in *Kubrick*, the plaintiff here unquestionably had ample "prospects" for timely bringing suit. As the district court emphasized, Sogecable could have brought timely suit, as Canal+ in fact did. App. 14a. Just as the Court held that the *Kubrick* malpractice plaintiff's time for bringing suit started once the loss of hearing was discovered, so too the Ninth Circuit should have held that Sogecable's time to sue started when the UserROM was published and the counterfeit cards were distributed. The court of appeal's contrary ruling directly conflicts with *Kubrick*.

Summary reversal is appropriate.

* * *

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

EUGENIE C. GAVENCHAK
Deputy General Counsel
News America Inc.
1211 Avenue of the Americas
New York, New York 10036

DARIN W. SNYDER
(Counsel of Record)
O'MELVENY & MYERS LLP
400 South Hope Street
Los Angeles, California
90071
(213) 430-6000

MARK S. DAVIES
DAVID J. L. MORTLOCK
SUSAN M. MOSS
O'MELVENY & MYERS LLP
1625 Eye Street, NW
Washington, DC 20006

June 11, 2007

APPENDIX A

COURT OF APPEALS MEMORANDUM OPINION

United States Court of Appeals,

Ninth Circuit.

SOGECABLE, SA; Canalsatelite Digital, S.L., Plaintiffs-Appellants,

v.

NDS GROUP PLC; NDS Americas, Inc., Defendants-Appellees.

No. 04-56990.

Argued and Submitted Nov. 14, 2006.

Filed Dec. 13, 2006.

Michael T. Purleski, Esq., Squire, Sanders & Dempsey, LLP, Los Angeles, CA, David S. Elkins, Esq., Squire, Sanders & Dempsey L.L.P., Palo Alto, CA, for Plaintiffs-Appellants.

Scott T. Wilsdon, Yarmuth Wilsdon Calfo, PLLC, Seattle, WA, Patrick Lynch, Esq., O'Melveny & Myers, LLP, Los Angeles, CA, Darin W. Snyder, Esq., O'Melveny & Myers, LLP, San Francisco, CA, for Defendants-Appellees.

Appeal from the United States District Court for the Central District of California; David O. Carter, District Judge, Presiding. D.C. No. CV-03- 01174-DOC.

Before B. FLETCHER, FERNANDEZ, and GRABER, Circuit Judges.

MEMORANDUM[*]

Plaintiffs Sogecable, S.A., and CanalSatélite Digital, S.L., which are Spanish satellite television companies, filed suit against Defendants NDS Group PLC and NDS Americas, Inc., alleging damages for Defendants' hacking into and publishing Plaintiffs' "smart card" data encryption code. Plaintiffs sued under the Digital Millenium Copyright Act, 17 U.S.C. § 1201; the Communications Act of 1934, 47 U.S.C. § 605(e)(4); and the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962. Plaintiffs also sued under California law for intentional interference with contract and for tortious interference with prospective economic advantage. *See Pac. Gas & Elec. Co. v. Bear Stearns & Co.*, 791 P.2d 587, 589-90 (Cal. 1990) (discussing the elements of both torts). The district court dismissed Plaintiffs' complaint, holding that (1) the non-RICO claims were time-barred, and (2) Plaintiffs did not allege facts sufficient to establish RICO enterprises. We reverse and remand for further proceedings.

We review de novo dismissals under Rule 12(b)(6), "accepting as true all well-pleaded allegations of fact in the complaint and construing them in the light most favorable to the plaintiffs." *Zimmerman v. City of Oakland,* 255 F.3d 734, 737 (9th Cir. 2001). "A complaint should not be dismissed unless a plaintiff could prove no set of facts in support of his claim that would entitle him to relief." *Parks Sch. of Bus., Inc. v. Symington,* 51 F.3d 1480, 1484 (9th Cir. 1995).

1. At argument, Defendants' counsel conceded that, under both federal and California law, equitable tolling protects a plaintiff who does not know, and even exercising reason-

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[*] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

able diligence could not know, *who* caused the harm that is the subject of the complaint. Here, taking the pleadings as true, Plaintiffs exercised due diligence before March 12, 2002, the date on which they first learned Defendants' identities.[1]

Plaintiffs, who did not have expertise in "smart card" technology, relied on the inventor and licensor of the technology to investigate the technological clues of Defendants' identities while Plaintiffs worked with Spanish law enforcement to track down those who were using the counterfeited technology. Plaintiffs hosted seminars and presentations for the Spanish authorities to educate them about digital television piracy. They filed approximately 70 claims against individuals and entities who were engaged in counterfeiting, including websites, manufacturers, distributors, dealers, accused hackers, and users of the counterfeit cards. In addition, they collaborated with other users of the technology to create a website to share information about hackers and possible countermeasures. Under these alleged facts, Plaintiffs were reasonable and diligent in taking an investigative approach similar to that used by drug enforcement agents.

Because--on the facts as pleaded--Plaintiffs were diligent until they learned Defendants' identities, the period of time before March 12, 2002, is equitably tolled and added to the end of the limitations period. *See Socop-Gonzalez v. INS,* 272 F.3d 1176, 1195-96 (9th Cir. 2001) (*en banc*) (rejecting the tolling rule adopted in *Santa Maria v. Pacific Bell,* 202 F.3d 1170, 1179 (9th Cir. 2000), and adopting "the conventional rule that when a statute of limitations is tolled, the days during a tolled period simply are not counted against the limitations period"); *Lantzy v. Centex Homes,* 73 P.3d

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[1] In ruling that Plaintiffs had not been diligent, the district court relied in part on Plaintiffs' actions *after* March 12, 2002. Those actions are irrelevant to determining whether Plaintiffs were reasonable and diligent *before* March 12, 2002, in trying to learn Defendants' identities.

517, 523 (Cal. 2003) (discussing California Supreme Court cases that "illustrate [that] the effect of equitable tolling is that the limitations period *stops running* during the tolling event, and begins to run again only when the tolling event has concluded. As a consequence, the tolled interval, no matter when it took place, is tacked onto the end of the limitations, thus extending the deadline for suit by the entire length of time during which the tolling event previously occurred."). Consequently, Plaintiffs had three years from March 12, 2002, to file their federal claims, and two years from March 12, 2002, to file their state claims. Thus, assuming their allegations to be true, when Plaintiffs filed suit in July 2003, all of their claims were timely.

2. To establish a violation of RICO, 18 U.S.C. § 1962(c), Plaintiffs alleged two associated-in-fact enterprises: a distribution enterprise and a technology enterprise.

On the distribution enterprise allegation, the district court held that Plaintiffs did not allege sufficient control by Defendant NDS Group over the enterprise. To invoke liability under § 1962(c), "*some* part in directing the enterprise's affairs is required," *Reves v. Ernst & Young,* 507 U.S. 170, 179 (1993), but *significant* control is not required, *id.* at 179 n. 4. Instead, "one must [only] participate in the operation or management of the enterprise itself." *Id.* at 185. "[L]iability under § 1962(c) is not limited to upper management," because "[a]n enterprise is 'operated' not just by upper management but also by lower rung participants in the enterprise who are under the direction of upper management." *Id.* at 184.

Here, Plaintiffs alleged a distribution enterprise that, at the very least, Defendant NDS Group helped to operate. According to the allegations, NDS Group organized the distribution enterprise to publish the hacked encryption code. The First Amended Complaint and the Second Amended Complaint are not necessarily inconsistent in this regard. It is not incongruous that Defendants would organize and direct the distribution enterprise and then charge another individual to implement the scheme. And Paragraph 102 of the First Amended Complaint explicitly alleged Defendants' involvement in the distribution enterprise. Even if we assume that statements in the Second Amended Complaint conflicted with statements in the First Amended Complaint, "[w]here ... the party making an ostensible judicial admission explains the error in a subsequent pleading or by amendment, the trial court must accord the explanation due weight." *Sicor Ltd. v. Cetus Corp.,* 51 F.3d 848, 859-60 (9th Cir. 1995) (citing *Am. Title Ins. Co. v. Lacelaw Corp.,* 861 F.2d 224, 226 (9th Cir. 1988)).

On the technology enterprise allegation, the district court held that Plaintiffs did not allege facts sufficient to establish a distinct RICO enterprise. "Under RICO, an 'enterprise' is 'a being different from, not the same as or part of, the person whose behavior the act was designed to prohibit.'" *Sever v. Ala. Pulp Corp.,* 978 F.2d 1529, 1533 (9th Cir. 1992) (quoting *Rae v. Union Bank,* 725 F.2d 478, 481 (9th Cir. 1984)). "[A] corporate defendant cannot be both the RICO person and the RICO enterprise under section 1962(c)." *Id.* at 1534.

Here, if we view the pleadings in the light most favorable to Plaintiffs, the enterprise consisted of two separate corporations--one existing under the laws of the United Kingdom and one existing under the laws of the State of Delaware--and individuals who appear to be independent contractors (the Haifa Team) hired to hack the encryption code. Accordingly, if we take the allegations as true, neither corporate Defendant is both the RICO person and the RICO enterprise, so there is a distinct RICO enterprise pleaded.

REVERSED and REMANDED.

APPENDIX B

DISTRICT COURT ORDER GRANTING NDS'S MOTION TO DISMISS THE SECOND AMENDED COMPLAINT

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

SOGECABLE, S.A., CANALSATELITE DIGITAL, S.L.,
Plaintiffs,
v.
NDS GROUP PLC, NDS AMERICAS, INC.,
Defendants.

CASE NO. SACV 03-1174 DOC
(ANx)

ORDER GRANTING MOTION
TO DISMISS SECOND AMENDED COMPLAINT

Before the Court is the motion of Defendants NDS Group PLC and NDS Americas, Inc. ("NDS"), to dismiss the second amended complaint ("SAC"). After reviewing the moving, opposing, and replying papers, after the hearing on July 23, 2004, and for the reasons given below, the Court GRANTS the motion to dismiss.

I. BACKGROUND

Plaintiff, Sogecable, is the leading provider of pay television services in Spain. It offers an analog broadcast pay television channel and a full range of multichannel digital direct-to-home subscription programming options through its subsidiary Canalsatelite Digital ("CSD"). Sogecable is an 83.25% shareholder in CSD, which has over a million subscribers. Sogecable and CSD have invested millions of dollars in an electronic security system to protect CSD programming from being obtained by unauthorized users. In particular, Sogecable entered into a license to use a "MediaGuard" system from its owner SECA, which is now Canal+ Technologies. A consumer wishing to subscribe to CSD's programming needs the necessary equipment, including a "Canal+ smart card" which deciphers access messages and provides the deciphering keys needed by the system to descramble the encypted transmission messages.

Defendant, NDS, is a supplier of conditional access software and a competitor of Canal+ Technologies. NDS has allegedly compromised the Canal+ security system and published the Canal+ code. NDS engineers in Israel allegedly disassembled and analyzed the Canal+ smart cards and hacked the code on them to allow unauthorized access. According to the complaint, NDS then transferred the code to its employee in California who subsequently transferred the code to one Al Menard who published the code on his website. This allowed altered smart cards to proliferate providing unauthorized access to Sogecable's satellite broadcasts.

On December 22, 2003, the Court issued an order ("December 22nd Order") granting the Defendants' motion to dismiss the First Amended Complaint ("FAC"). The basis for the Court's ruling was that Plaintiffs had not adequately alleged a RICO enterprise and that all of the Plaintiffs' non-RICO claims were time-barred on the face of the FAC. Regarding the statute of limitations, the Court specifically rejected Plaintiffs' argument that it was not possible through diligence to have discovered the identities of the proper defendants as inconsistent with the other allegations of the FAC. Furthermore, the Court found that California law and Ninth Circuit precedent require some form of fraudulent concealment in order to equitably toll the statute of limitations and Plaintiffs had not adequately pled such fraudulent concealment.

II. LEGAL STANDARD

Under Federal Rule of Civil Procedure 12(b)(6), a complaint can be dismissed when a plaintiff's allegations fail to state a claim upon which relief can be granted. The court must construe the complaint liberally, and dismissal should not be granted unless "it appears beyond doubt that the plaintiff can provide no set of facts in support of his claim which would entitle him to relief," *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 101-02 (1957), *see Balistreri v Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990) (stating that a complaint should be dismissed only when it lacks a "cognizable legal theory" or sufficient facts to support a cognizable legal theory).

The Court must accept as true all factual allegations in the complaint and must draw all reasonable inferences from those allegations, construing the complaint in the light most favorable to the plaintiff. *Westlands Water Dist. v. Firebaugh Canal*, 10 F.3d 667, 670 (9th Cir. 1993), *Balistreri*, 901 F.2d at 699, *NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986).

Dismissal without leave to amend is appropriate only when the Court is satisfied that the deficiencies of the complaint could not possibly be cured by amendment. *Chang v. Chen*, 80 F.3d 1293, 1296 (9th Cir. 1996), *Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987).

III. ANALYSIS

A. Statute of Limitations

Defendants again argue that Plaintiffs' non-RICO claims are barred by the statute of limitations The statutes of limitations for the asserted Digital Millennium Copyright Act ("DMCA") and Federal Communications Act ("FCA") claims are three years, 17 U.S.C § 507(b), Cal Code Civ Proc § 338(1), and the statutes of limitations for the asserted state law claims is two years, *Knoell v. Petrovich*, 76 Cal App. 4th 164, 168 (1999)

1. Accrual

Plaintiffs argue that "Sogecable does not know and thus does not allege the date it was first injured by NDS." (Opposition at 12) Plaintiffs proceed to further state that, "Because the court must construe the SAC in the light most favorable to plaintiff, and because factual uncertainty exists as to when 'non-MOSC' counterfeit cards from the fruit of NDS's wrongdoing entered Spain, Sogecable's claims are deemed to have accrued no earlier than January 2001 [when MOSC cards entered Spain]" (*Id.*)

The distinction Plaintiffs are drawing between "non-MOSC" and "MOSC" cards is difficult to understand in this context. Apparently MOSCs are "those pirate cards that could be `updated' to overcome Sogecable's piracy countermeasures," (*Id.*), while presumably non-MOSCs (sometimes referred to in the SAC as just "smart cards", *see* SAC ¶ 51 making a distinction between "counterfeit smart cards" and MOSCs) cannot be updated. However, the SAC claims damages from both types of cards. The SAC abruptly abandons its distinction between "smart cards" and MOSCs in ¶ 51 and from that point on only refers to "pirate cards" and seeks damages due to the use of both cards. *See, e g* , SAC ¶ 124 ("The widespread use of pirate cards for which defendants are responsible has caused CSD to lose substantial subscription revenues").

A further examination of the SAC further undercuts the "smart card" / MOSC distinction for accrual purposes Paragraph 120 of the SAC states, in its entirety:

> The smart cards are the key to the MediaGuard system and the linchpin in the protection of Sogecable's satellite television broadcasts. Once the smart card technology was compromised and distributed by NDS or at

> its direction and control, pirate cards were made possible and proliferated, causing the theft of Sogecable's satellite television broadcasts – its primary source of revenue Sogecable suffered substantial damages as a result.

(SAC 120) Paragraph 120 shows, in Plaintiffs' own words, that the injury was sustained as early as the "smart card technology was compromised and distributed by NDS."

The SAC further alleges that, "In July 1999, Sogecable first became aware of what it reasonably believed to be isolated incidents of counterfeit smart cards" (SAC 45). At that point, Plaintiffs were, as shown on the face of their complaint, aware that their smart card technology was compromised and was aware that at least a small number of counterfeit smart cards were being sold. The fact that Plaintiffs may have thought that the injury was "isolated" is inconsequential to determining when the injury occurred.[1]

The much more interesting and relevant question — and a question not extensively addressed by either party in the briefs — is whether Plaintiffs' causes of action accrued when Plaintiffs discovered the "hack" of the security system or when Plaintiffs discovered the first "pirate cards" sold in Spain.

The basic statement of accrual law is that "a claim accrues when the plaintiff knows or has reason to know of the injury which is the basis of the action." *Tworivers v. Lewis*, 174 F.3d 987, 991 (9th Cir. 1999). The question is what constitutes the "injury" in this case.

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[1] Plaintiffs attempted to clarify the MOSC/ non-MOSC distinction at oral argument. Apparently, production of non-MOSC cards does not require that the security system's UserROM to be compromised. However, as discussed in depth below, the FAC specifically stated that cards available in 1999 "contained a perfect replica of the complex encryption table NDS extracted through the Haifa hack [referred to in the SAC as the "Canal+ Hack"]" (FAC ¶ 45).

For the DMCA and FCC claims, the Court finds that the action accrues at the time Plaintiff was aware or should have been aware that the security system was "hacked." In determining the proper time for accrual of a claim it is important to examine the actual requirements of the claim Plaintiffs assert that Defendants have violated 17 U.S.C. §§ 1201(a)(2) and 1201(b). These sections are substantially similar and state in relevant part.

> No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that —
>
> (A) is primarily designed or produced for the purpose of circumventing protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or portion thereof,
>
> (B) has only limited commercially significant purpose or use other than to circumvent protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof, or
>
> (C)

17 U.S.C. § 1201(b). 47 U.S.C. § 605(e)(4) similarly states that

> Any person who manufactures, assembles, modifies, imports, exports, sells, or distributes any electronic, mechanical, or other device or equipment, knowing or having reason to know that the device or equipment is primarily of assistance in the unauthorized decryption of satellite cable programming, or direct-to-home satellite services [is in violation of this section]

Id.

These are simply not statutes with complicated accrual problems The "injury" under these statutes is the distribution of the "device" that is designed to circumvent copyright protection or allow unauthorized decryption of satellite broadcasting. While the harm from mere distribution of circumvention technology may be abstract, this comes from the fact that Congress has chosen to create liability for a practice that can sometimes result in an abstract harm. The statutes do not require that anyone actually circumvent copyright protection – only that a device designed to circumvent copyright protection was distributed. Furthermore, it is clear to this Court that Plaintiffs could have brought suit against Defendants under the DMCA and FCC for injunctive relief once they knew that the system had been cracked and critical copyright protection information was being distributed.

Although the alleged fact was left out of the SAC, Plaintiffs specifically pled in the FAC that

> As noted above, in 1999, counterfeit MediaGuard smart cards began emerging on markets worldwide. These cards, produced only after publication of the MediaGuard UserROM, contained a perfect replica of the complex encryption table NDS extracted through the Haifa hack [referred to in the SAC as the "Canal+ Hack"] and caused to be published on the DR7 website.

(FAC 45) To the degree that the SAC implies that the "smart cards" distributed in 1999 may not have contained the entire MediaGuard UserROM, it is disregarded as inconsistent with Plaintiffs' prior pleadings *Reddy v. Litton Indus Inc.*, 912 F.2d 291, 296-97 (9th Cir. 1990) ("the amended complaint may only allege other facts consistent with the challenged pleading.")

The SAC clearly connects the MediaGuard UserROM to the complained of SECAROM ZIP allegedly distributed by the Defendants

> NDS used the results of this work to download the UserROM software from the Canal+ MediaGuard smart card. The UserROM is the portion of the memory of a smart card that is necessary to control access to the digital data stream. The Haifa team created a digital archive file named "SECAROM ZIP," containing a copy of the MediaGuard UserROM

(SAC ¶ 81) The distribution of "SECAROM ZIP" is the basis of Plaintiffs' DMCA and FCC claims (*See*, e.g., SAC ¶¶ 134, 135, 144, 145). Even more clearly, Plaintiffs allege that

> On March 26, 1999, Menard at DR7 published Canal+'s UserROM code on the DR7 website. For a few months after its posting, the Canal+ MediaGuard UserROM code could be downloaded for free by hackers and counterfeiters, enabling them to produce, distribute, and sell pirate cards. This was precisely NDS's intent

(SAC ¶ 84)

Given all of these statements in Plaintiffs' complaints, their claims under the DMCA and FCC accrued at least by the time that they noted the counterfeit MediaGuard smart cards began to emerge that "contained a perfect replica of the complex encryption table NDS extracted through the Haifa hack and caused to be published on the DR7 website" (FAC ¶ 45) At this point, 1999, Plaintiffs knew, or reasonably should have known, that someone had distributed the MediaGuard UserROM (a/k/a SECAROM ZIP).

The Court need not reach the perhaps more complicated issue of accrual of the state interference torts because pirate cards were being sold in Spain by at least July 2000 and the state interference torts only have two year statutes of limitations.

2. Inability to Discover Alleged Wrongdoers through Diligence

Plaintiffs once again argue that they were unable to possibly discover the identity of the alleged wrongdoers through reasonable diligence. The Court rejected this argument in the December 22nd Order that dismissed the FAC, noting that the FAC explicitly stated that Plaintiffs had relied on Canal+ to investigate the identities of the hackers of the security system.

In the SAC, Plaintiffs add statements that explain this reliance in terms of the normal reliance that one might place on a consultant. (*See* SAC ¶ 162) Since the SAC clearly alleges that Plaintiffs do not have expertise in the security business, (*Id.*), this type of reliance is not entirely unreasonable.

However, nothing in the SAC alters the uncontroverted fact that Canal+ filed suit on March 11, 2002 against Defendants for the same conduct alleged in this action. *Group Canal+ S.A., et al. v. NDS Group PLC., et al*, Case No 02-CV-01178 (N.D. Cal.) (hereinafter "Canal+ Action") (*See* Plaintiffs' Judicial Notice Ex. B) Obviously Canal+ was, in fact, able to acquire enough information by some point prior to March 11, 2002, to allow it to allege that Defendants engaged in the conduct of which Plaintiffs complain. If Plaintiffs relied upon Canal+ expertise to investigate Plaintiffs' claims as is strongly implied in SAC ¶ 62, then reasonable diligence means that Plaintiffs should have taken steps to ensure that Canal+ would "keep them in the loop" on the outcome of that investigation. The Court sees no reason to prejudice Defendants for the alleged lack of communication between Plaintiffs and Canal+.

Furthermore, there is no reasonable explanation for the lapse of time between the Canal+ filing date of March 11, 2002, and the date Plaintiffs filed their motion for intervention in the Canal+ Action, December 19, 2002. Plaintiffs explicitly admitted in their FAC that "Sogecable and CSD reasonably relied on Canal+ to safeguard their interests and claims against NDS in the Northern District action." (FAC 16). Furthermore, Plaintiffs admitted in the FAC that they did not move to intervene in the Canal+ Action until it became clear that Canal+ was moving to settle its claims with Defendants, apparently in a way that was unsatisfactory to Plaintiffs (*See* FAC 1117). The Court is not pointing out the lapse in time between the filing of the Canal+ Action in reversion to the rule of *Santa Maria v. Pac Bell*, 202 F.3d 1170 (9th Cir. 2000) that a plaintiff who is otherwise entitled to equitable tolling cannot use the doctrine when it was able to file its suit within the normal statute of limitations — a rule that was repudiated in *Socop-Gonzalez v. INS*, 272 F.3d 1176 (9th Cir. 2001) (en banc). Rather, this lapse is mentioned as further evidence that Plaintiffs are *not entitled to tolling* for any part of the claimed period because Plaintiffs, according to their own pleadings, have sat back on their rights and allowed another party to "safeguard their interests and claims against NDS."

Plaintiffs only arguments for tolling contradict the express admissions that they have made In light of this, the Court finds that there is no set of facts that Plaintiffs can prove that would warrant equitable tolling. Plaintiffs state that they could not have discovered the identity of the Defendants within the required period, but the very entity that Plaintiffs were using to investigate their claims undeniably discovered the identity of the Defendants at a much earlier date than the filing of this action. It is also undeniable from the explicit admissions by Plaintiffs in their complaints that Plaintiffs not only relied upon another party to investigate their claims —which might have been reasonable under the circumstances — but also relied on another party to pursue those claims in court. This is not at all consistent with the reasonable diligence required for equitable tolling of the statute of limitations.

Furthermore, there is nothing in any of Plaintiffs' complaints that would indicate that this is an usual or extraordinary case. Plaintiffs basically describe conduct that is both illegal and inherently difficult to discover. Congress chose to set the statute of limitations on this conduct at three years, and presumably Congress took the "shadowy" nature of computer hackers into account in making that determination. There is nothing alleged in the SAC, or in the first two complaints, that would indicate any limit to the equitable tolling argument advanced by the Plaintiffs, and the same arguments could be advanced by virtually any DMCA or FCC plaintiff.[2]

3. Intentional Concealment by Defendants

Plaintiffs once again argue that Defendants should be equitably estopped from succeeding on their statute of limitations defense because Defendants intentionally concealed their role in the alleged acts that injured Plaintiffs. However, this contention is directly contradicted by Plaintiffs' FAC that expressly stated that "The code [SECAROM ZIP] was viewed as 'legitimate' within the hacker community because it was known to have been from an NDS operative." (FAC ¶ 45) As noted earlier, pleadings that are inconsistent with Plaintiffs' prior pleadings should be disregarded *Reddy v. Litton Indus. Inc.*, 912 F.2d 291, 296-97 (9th Cir. 1990) ("the amended complaint may only allege other facts consistent with the challenged pleading.")

Plaintiffs attempt to explain away the statement that the code was "known to have been from an NDS operative" (and its notable absence from the SAC) is utterly unconvincing. First, Plaintiffs argue that the statement came from Canal+'s complaint Plaintiffs provide no citations to either the complaint or first amended complaint in the Canal+ Action, and, indeed, this statement is not in either (*See* Defendant's Third Request for Judicial Notice, Ex. A & B) To clarify the significance of this Plaintiffs have made a representation to this Court that appears to be completely and verifiably false.

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[2] Plaintiffs might argue that the unexpected involvement of a legitimate company makes this an usual case, but one of the keys to Plaintiffs' tolling argument is that they could not pinpoint Menard and DR7 as the source of the UserROM. Menard is clearly identified in the SAC as a "known satellite television signal pirate and hacker." (SAC ¶ 83) The alleged difficulty in discovering Menard's involvement would indicate that a similar tolling argument could be made against Menard or any other ordinary hacker.

Plaintiffs further argue that the statement was removed from the SAC because it was "ambiguous and misleading." (Opposition at 8) The entire text of paragraph 45 of the FAC is as follows with the relevant portion bolded.

> As noted above, in late 1999, counterfeit MediaGuard smart cards began emerging on markets worldwide. These cards, produced only after publication of the MediaGuard UserROM, contained a perfect replica of the complex encryption table NDS extracted through the Haifa hack and caused to be published on the DR7 website. The code was viewed as legitimate within the hacker community because **it was known to have been from an NDS** operative. Without that information the counterfeit cards would not have been able to carry out their purpose – to trick the MediaGuard system in [sic] believing the user of the counterfeit or altered smart card was authorized to have access to certain programming protected by the system without payment for that access.

(FAC ¶ 45) (emphasis added) Plaintiffs claim that the bolded language was "ambiguous and misleading" because it "suggested that Sogecable knew in 1999" that NDS was involved.

The Court rejects the argument that the language is in any way ambiguous or misleading. It says, "The code was viewed as legitimate within the hacker community because it was known to have been from an NDS operative." The

Court was *not* under the impression that paragraph 45 was saying that Sogecable was aware of NDS's involvement in 1999 Plaintiffs alleged in that paragraph that at least the *hacker community* knew that the MediaGuard UserROM being distributed on the DR7 website was from NDS. Plaintiffs claim that "what a hacker in 1999 knew about the source of the DR7 posting matters not." (Opposition at 8) But what hackers knew in 1999 does matter . Plaintiffs are arguing that NDS concealed its role in the alleged acts. If the "hacker community" was aware that NDS was involved, NDS was apparently not concealing its identity. A potential defendant is not required to walk up to a potential plaintiff and strike him on the face with a white glove to ensure that the plaintiff is aware that he has been wronged. Defendants are not required to call Plaintiffs on the telephone and say, "Hey, we hacked your system," in order for equitable estoppel to not apply. Paragraph 45 of the FAC is not even a statement that one or two people knew, but rather that a "community" was aware of NDS's involvement which is inconsistent with an allegation that NDS was concealing its role in the activities.[3]

In short, the allegations in the SAC "were changed in material ways that were not adequately explained." *Bradley v. Chiron Corp.*, 136 F.3d 1317, 1325 (Fed Cir. 1998) (interpreting Ninth Circuit law). Before the unexplained changes, the FAC, on its face, alleged facts that completely undermined a finding of equitable estoppel. As the Ninth Circuit has aptly noted, "Whether the case can be dismissed depends on what the pleadings say. A plaintiff may plead herself out of court. If the pleadings establish facts compelling a decision one way, that is as good as if depositions and other expensively obtained evidence on summary judgment establishes the identical facts." *Weisbach v. County of Los Angeles*, 119 F.3d 778, 783 n.1 (9th Cir. 1997). This rule requiring a plaintiff to maintain some consistency between earlier and later pleadings is not at all unfair considering the fact that a court must take the facts alleged in the pleadings as true when ruling upon a Rule 12(b)(6) motion. Otherwise a plaintiff could have it "both ways" – pleading in great detail on "information and belief" to avoid dismissal, especially in fraud cases, and then disavowing the pleadings when they turn out to be inconvenient.

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[3] In response to this section in the tentative order issued by the Court, Plaintiffs argued that knowledge in the "hacker community" cannot be imputed to the Plaintiffs. Once again, the Court is not under the impression that Plaintiffs necessarily knew in 1999 that NDS was involved in the placement of the code, nor is it imputing such knowledge to Plaintiffs. This portion of the FAC is relevant because it severely undercuts Plaintiffs' argument that NDS concealed its involvement. In equitable estoppel and fraudulent concealment, the point is not what Plaintiffs knew, the point is what actions NDS took to conceal.

An independent reason to reject Plaintiffs' equitable estoppel argument is because they have not alleged any reliance on any fraudulent statements or actions by the Defendants." A plaintiff's reasonable reliance on fraudulent concealment is required for application for equitable estoppel." *Santa Maria v. Pacific Bell*, 202 F.3d 1170, 1173 (9th Cir. 2002). Furthermore, a plaintiff "must plead with particularity the facts which give rise to the claim of fraudulent concealment." *Guerrero v. Gates*, 357 F.3d 911, 919 (9th Cir. 2004).

Plaintiffs argue that reliance is not required for a finding of equitable estoppel through fraudulent concealment. While some cases do refer to reliance as one of a list of "non-exhaustive" factors, *see Santa Maria*, 202 F.3d at 1176, *Johnson v. Henderson*, 314 F.3d 409, 414 (9th Cir. 2002), clear precedent also points out that reliance is a necessary requirement for equitable estoppel, *Santa Maria*, 202 F.3d at 1177 ("if a misrepresentation is to equitably estop PacBell from asserting the statute of limitations, Santa Maria must show that his reliance on it was reasonable"), *id.* at 1173.

("We hold that a plaintiffs reasonable reliance on fraudulent concealment is required for application of the doctrine of equitable estoppel"), *Guerrero*, 357 F.3d at 919 ("The plaintiff must demonstrate that he relied on the defendant's misconduct in failing to file in a timely manner.").

Plaintiffs' attempt to invoke the securities fraud concept of "presumed reliance," *see Basic, Inc. v. Levinson*, 485 U.S. 224 (1988), is wholly inapposite. "Presumed reliance," as used in securities law for publicly traded stocks is an extension of the belief that public securities markets in the United States are efficient and any false information provided by a company will be incorporated into investor decisions through that efficient market. This case has nothing to do with an efficient market or the efficient market hypothesis.

4. Motion to Intervene in Canal+ Action

Plaintiffs state that their motion to intervene in the Canal+ Action should toll the statute of limitations for the period of "December 2002 through July 25, 2003." The Court finds that there is little clear precedent on whether a motion to intervene in one action tolls the statute of limitations in a separate action. However, the Court need not decide this issue because Plaintiffs' claims are time barred regardless of whether the motion to intervene tolled time in this case.

As an initial matter, there appears to be no support for the argument that the tolling period would extend to July 25, 2003 — the filing date of this action. Plaintiffs filed their motion to intervene on December 19, 2002, and the Canal+ Action was terminated with no ruling on the motion to intervene on May 14, 2003. At most, the motion to intervene results in a tolling between those dates — slightly less than five months. Taking the allegations of the complaint in the light most favorable to the Plaintiffs, Plaintiffs' DMCA and

FCC claims accrued on December 31, 1999,[4] and the statute of limitations would have run, without tolling, on December 31, 2002. A slightly less than five month tolling due to the intervention motion leads to a critical date near the end of May 2003. This action was filed on July 25, 2003.

Similarly, even assuming that the state interference claims accrued on July 31, 2000, the two year statutes of limitations would have run, without tolling, on July 31, 2002. A five month tolling only makes the critical date for those claims in late December 2002, well before July 25, 2003.[5]

5. Judicial Estoppel

Judicial estoppel does not provide a bar to Defendants asserting their statute of limitations and res judicata defenses. The purpose of the doctrine of judicial estoppel is "to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment." *New Hampshire v. Maine*, 532 U.S. 742, 749-50, 121 S. Ct. 1808 (2001) (internal quotations omitted). The Supreme Court has outlined three general factors that are looked to when a court examines judicial estoppel question, but has also noted that judicial estoppel is "an equitable doctrine invoked by a court at its discretion." *Id.* at 750.

The three factors pointed out by the Supreme Court were:

> First, a party's later position must be clearly inconsistent with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in

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[4] The accrual date is December 31, 1999, because Plaintiffs only state that they discovered the pirated cards in "1999"

[5] In fact, the statutes of limitations on the state claims had even run at the time of the intervention motion.

> a later proceeding would create the perception that either the first or second court was misled. [And third,] whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Id. at 750-51 (internal quotations and citations omitted).

The Court has before it all of the information necessary to make a determination on judicial estoppel in this case. The Court has the entire transcript of the April 3, 2002 heating at which Defendants are alleged to have made a representation to Judge Vaughn Walker presiding over the Canal+ Action that "the putative interveners would suffer no prejudice from the dismissal" (Opposition at 20) The parties also agree that Judge Walker dismissed the Canal+ Action without making any ruling on the motions for intervention, thereby mooting the issue.

After reviewing the April 3, 2002 hearing transcript, it is clear to the Court that Defendants did not take a position "clearly inconsistent" with an assertion of a statute of limitations defense. The statement by Defendants' counsel which allegedly should invoke judicial estoppel is

> Well, once the Canal+ claim is dismissed with prejudice, there's nothing that can happen in this action that would be harmful or impair or impede in anyway [sic] the claims that Echostar or any of the other parties wished to make

(Sogecable Request for Judicial Notice Ex. A (April 3, 2002 Hearing Tr.) at 9:11-14)

A review of the statements by Defendants' counsel immediately before the quoted passage makes the context of counsel's statements clear

> The litigation that originally came to your honor, is going to be disposed of on the merits by an arm's-length negotiated settlement, and I submit to your honor that in that light, in that context, Rule 24 clearly does not permit intervention, because under Rule 24(a) if intervention is to be allowed, there must be, not only an interest in the subject matter of the action but an interest that stands to be impaired or prejudiced by the prosecution of the action in the absence of the would-be intervener
>
> Well, once the Canal+ claim is dismissed with prejudice, there's nothing that can happen in this action that would be harmful or impair or impede in anyway [sic] the claims that Echostar or any of the other parties wished to make

(*Id.* at 9:2-14)

This was a statement about prejudice in the Canal+ Action, not in any other action the proposed interveners might file. "[T]here's nothing that can happen in *this action* that would be harmful." (*Id.*) The argument was that there would be no prejudice in the Canal+ Action because the Canal+ Action would be terminated if not for the proposed intervention.[6] A further reading of the entire transcript of the April 3, 2002 hearing confirms that in the entire discussion by all counsel present, as well as Judge Walker, the statute of limitations (or any other bar) is not mentioned even one time by anyone.

---

[6] At oral argument, Plaintiffs tried to minimize this reasoning by noting that "of course" there would be no prejudice stemming from the Canal+ Action if that case were dismissed — with the implication that Defendants must have been talking about some other sort of prejudice. But the lack of prejudice from a settled Canal+ Action was exactly what the Defendants were talking about The Defendants' point was simply that a motion to intervene into a settled case makes no sense. (Remember that the motions to Intervene were not filed until the Canal+ Action had basically been settled)

As the Court finds that Defendants' prior statements in the April 3, 2002 hearing are not in any way inconsistent with an assertion of the statute of limitations in this separate action and the Court finds that a change of positions is the critical threshold requirement for application of judicial estoppel, Plaintiffs' request that Defendants be judicially estopped is denied.

B. RICO

1. RICO Enterprise

To state a claim under 18 U.S.C. § 1962(c), a plaintiff must plead the existence of an "enterprise" that is engaged in a pattern of racketeering activity or collection of unlawful debt. The RICO statute defines "enterprise" to mean (1) "any individual, partnership, corporation, association, or other legal entity," and (2) "any union or group of individuals associated in fact although not a legal entity." 18 U.S.C § 1961(4)

In this case, Plaintiffs RICO claim is primarily based on an enterprise of the second variety. The Supreme Court has held that an associated in fact enterprise under RICO must (1) have an ongoing formal or informal organization and (2) function as a continuing unit *See United States v. Turkette*, 452 U.S. 576, 583, 101 S. Ct. 2524, 2528 (1981). The law of the Ninth Circuit further requires that the "organization, formal or informal, be an entity separate and apart from the pattern of racketeering activity in which it engages." *Chang v. Chen*, 80 F.3d 1293, 1298 (9th Cir. 1996).

In the First Amended Complaint, Plaintiffs alleged the existence of a "technology structure" and a "distribution structure" that were alleged to both be part of a single RICO enterprise. The RICO allegations of the FAC were dismissed because the FAC did not effectively connect the two "structures" into a single cohesive enterprise controlled through a single hierarchy. The Second Amended Complaint now alleges that the technology and distribution structures are separate RICO enterprises although they worked together to accomplish the acts that form the basis of the complaint.

a. Distribution Enterprise

The Court finds that the allegations that Defendants were part of and, in fact, controlled a Distribution Enterprise as described in the SAC fail because these allegations directly contradict statements previously made in Plaintiffs' FAC

The SAC states that

> Plaintiffs are informed and believe that NDS Group itself exercised control over [the distribution] enterprise and made all decisions for it, although Tarnovsky served as the common member and "bridge" between the two enterprises, and Tarnovsky may have exercised some degree of discretion in directing and controlling the distribution enterprise under potentially broad mandates or instructions from NDS Group

(SAC ¶ 166)

This directly contradicts the following statements from the FAC

> Participant Al Menart [sic Menard] is or was at the top of the distribution and sale structure of the enterpnse and controls this enterpnse through various business entities

(FAC ¶ 94)

> Participant Al Menart [sic] exerted control over the direction of the enterprise by, for example, selling devices that allowed the pirates to operate as "dealers" of altered Access Cards

(FAC ¶ 95)

Compare these statements to

> NDS is or was the primary decision maker of the technology structure of the enterprise, controlling and directing the affairs of Christopher Tarnovsky on an ongoing basis and recruiting or attempting to recruit others for the enterprise. NDS exerted control over the direction of the enterprise by, for example, employing or attempting to employ individuals to hack or break the MediaGuard system, and by determining what technology and information would be made available to harm the owners and users of the MediaGuard system, including Sogecable and CSD.

(FAC ¶ 96) Notably, NDS (NDS Group or NDS Americas) is not alleged in the FAC to have been a part of the "distribution structure."

As regrettably stated several times before in this Order, the SAC will be disregarded to the extent that it is inconsistent with Plaintiffs' prior pleadings. *Reddy v. Litton Indus. Inc.*, 912 F.2d 291, 296-97 (9th Cir. 1990) ("the amended complaint may only allege other facts consistent with the challenged pleading") Plaintiffs, in their opposition, attempt to reconcile the obviously inconsistent statements in their pleadings by arguing that the SAC makes clear that NDS "directed Menard's posting of MediaGuard in a particular place and in a manner that would obfuscate its source, while ensuring that satellite pirates obtained it and used it." (Opposition at 24) Besides the obvious fact that this statement contradicts the statement in the FAC that "The code was viewed as legitimate within the hacker community because it was known to have been from an NDS operative," (FAC ¶ 45), the Defendants correctly point out that the relationship cited in the Opposition brief is simply not in the SAC. The paragraphs of the SAC cited (SAC ¶¶ 82-83, 92, 107) state that NDS instructed *Tarnovsky* to post the offending code on the Internet (*See* SAC ¶ 82), and only that "Tarnovsky or another employee from NDS Americas transmitted the code from California to Al Menard." (SAC ¶ 83) There is no allegation in the SAC that NDS in any way exerted any control over the way in which Menard chose to distribute the code. At best, the SAC alleges a supplier/distributor relationship between NDS and Menard which is insufficient to show control for RICO enterprise purposes.

Since the alleged connection between NDS Group and the Distribution Enterprise is that "NDS Group itself exercised control of this enterprise and made all decisions for it," and this alleged connection is inconsistent with the allegations of the FAC, the SAC does not adequately plead that NDS Group is part of any RICO "Distribution Enterprise."

b. Technology Enterprise

The allegations in the SAC that Defendant, NDS Group, is a part of a separate RICO Technology Enterprise are consistent with the FAC The question then is whether this Technology Enterprise is sufficiently plead as a RICO enterprise.

Defendants point out that the Technology Enterprise, as alleged, only includes NDS Group, its subsidiary NDS Americas, and its employees Defendants then argue that a RICO enterprise must be an entity distinct from the actual RICO defendant *See Rae v. Union Bank*, 725 F.2d 478 (9th Cir. 1984).

Rae states that a RICO enterprise is "a being different from, not the same as or part of, the person whose behavior the act was designed to prohibit." *Id.* at 481 Therefore, "a corporate defendant cannot be both the RICO person and the RICO enterprise under section 1962(c)." *Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1534 (9th Cir. 1992). As the *Sever* court pointed out, this "poses a problem only when the corporation is the named defendant — when it is both the 'person' and the 'enterprise'" *Id.* (contrasting the situation where the plaintiff "named the several individual officers as defendants/persons and [the corporation] as the enterprise.")

In this case, the only defendant named under the RICO count of the complaint is NDS Group However, the "Technology Enterprise" is allegedly made up of NDS Group, the "Haifa Team", and NDS Americas. (SAC ¶ 165) The "Haifa Team" was composed of NDS employees (*See* SAC ¶¶ 8, 75, 76). NDS Americas is a subsidiary of NDS Group. (SAC ¶¶ 8, 15). Thus, the "Technology Enterprise" appears to be nothing more than a subset of NDS Group. Even if some of the "hackers" were only nebulous "agents" of NDS Group and not technically employees, the important fact remains that the only structure that the Technology Enterprise is alleged to have is that of NDS Group itself. This is exactly the type of RICO claim prohibited by *Rae* — the situation where the Defendant is both the RICO person and the RICO enterprise It is clear from the SAC that the "Technology Enterprise" structure is NDS Group or a piece of NDS Group and the defendant/person is also NDS Group. Therefore, the RICO enterprise allegation with respect to the Technology Enterprise also fails.

2. Pattern of Racketeering Activity

Since the Plaintiffs have not properly pled a RICO enterprise, the Court does not reach the question of whether they have properly pled a pattern of racketeering activity.

C. Res Judicata

Since all of the claims have been dismissed on other grounds, the Court does not reach the Defendants' res judicata arguments.

IV. DISPOSITION

For the reasons given above, Defendants' motion is GRANTED and the second amended complaint is DIS-

MISSED. Plaintiffs' may amend their complaint within 30 days of this order.

IT IS SO ORDERED

DATED AUGUST 3, 2004

/s/ David O. Carter

DAVID O. CARTER
United States District Judge

APPENDIX C

ORDER OF THE DISTRICT COURT GRANTING NDS'S MOTION TO DISMISS THE FIRST AMENDED COMPLAINT

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

SOGECABLE, S.A.,
CANALSATELITE DIGITAL, S.L.,

Plaintiff(s),

v.

NDS GROUP PLC, NDS
AMERICAS, INC.,

Defendant(s).

CASE NO. SACV 03-1174 DOC (ANx)

ORDER GRANTING MOTION TO DISMISS

Before the Court is the motion of Defendants NDS Group PLC and NDS Americas, Inc. ("NDS"), to dismiss the first amended complaint ("FAC"). After reviewing the moving, opposing, and replying papers, after the hearing on December 22, 2003, and for the reasons given below, the Court GRANTS the motion to dismiss.

I. BACKGROUND

Plaintiff, Sogecable, is the leading provider of pay television services in Spain. It offers an analog broadcast pay television channel and a full range of multichannel digital direct-to-home subscription programming options through its subsidiary Canalsatelite Digital ("CSD"). Sogecable is an

83.25% shareholder in CSD, which has over a million subscribers.

Sogecable and CSD have invested millions of dollars in an electric security system to protect CSD programming from being obtained by unauthorized users. In particular, Sogecable entered into a license to use a "MediaGuard" system from its owner SECA, which is now Canal+ Technologies. A consumer wishing to subscribe to CSD's programming needs the necessary equipment, including a "Canal+ smart card" which deciphers access messages and provides the deciphering keys needed by the system to descramble the encrypted transmission messages.

Defendant, NDS, is a supplier of conditional access software and a competitor of Canal+ Technologies. NDS has allegedly compromised the Canal+ security system and published the Canal+ code. NDS engineers in Israel allegedly disassembled and analyzed the Canal+ smart cards and hacked the code on them to allow unauthorized access. According to the complaint, NDS then transfered the code to its employee in California who subsequently transferred the code to one Al Menart who published the code on his website. This allowed altered smart cards to proliferate providing unauthorized access to Sogecable's satellite broadcasts.

II. LEGAL STANDARD

Under Federal Rule of Civil Procedure 12(b)(6), a complaint can be dismissed when a plaintiff's allegations fail to state a claim upon which relief can be granted. The Court must construe the complaint liberally, and dismissal should not be granted unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 101-02 (1957); *see Balistreri v, Pacifica Police Dept*, 901 F.2d 696, 699 (9th Cir. 1990) (stating that a complaint should be dismissed only when it lacks a "cognizable legal theory" or sufficient facts to support a cognizable legal theory).

The Court must accept as true all factual allegations in the complaint and must draw all reasonable inferences from those allegations, construing the complaint in the light most favorable to the plaintiff. *Westlands Water Dist. v. Firebaugh Canal*, 10 F.3d 667, 670 (9th Cir. 1993); *Balistreri*, 901 F.2d at 699; *NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986).

Dismissal without leave to amend is appropriate only when the Court is satisfied that the deficiencies of the complaint could not possibly be cured by amendment. *Chang v. Chen*, 80 F.3d 1293, 1296 (9th Cir. 1996); *Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987).

III. ANALYSIS

A. Statute of Limitations

Plaintiffs' Digital Millennium Copyright Act ("DMCA") claims under 17 U.S.C. § 1201 are barred by the statute of limitations. The most precise statement of Plaintiffs' DMCA allegations is found in paragraph 65 of the FAC:

> Defendants' importation of a computer file to California that contained the hacked code to the encryption technology, NDS Americas' receipt of the file here, and the distribution of that code to be posted on the DR7 website were acts material to and a direct cause of Sogecable's and CSD's losses.

FAC ¶ 65.

According to the FAC, all of these actions took place by the time Al Menart allegedly published the code on his website on March 16, 1999. See FAC ¶ 44. There appears to be no allegation that Defendants engaged in any actions in violation of section 1201 since late 1999. The current action was filed July 25, 2003, and the DMCA has a three year statute of limitations. Even if the statute of limitations was tolled during the five month period pending intervention in the Canal+ case, the claims are still barred by at least a few months.

Plaintiffs try to save their DMCA claims by arguing that Defendants' actions constitute a continuing pattern of contributory infringement. Without deciding whether contributory infringement applies to section 1201 claims, this argument fails for at least two separate reasons: (1) Plaintiffs have simply not pled contributory infringement and (2) the last acts actually taken by Defendants took place in 1999.

From the immediate face of the FAC, the state law claims would also appear to be barred by the statute of limitations which is two years for both claims. As stated before, the last alleged conduct on the part of Defendants took place in March 1999, Plaintiffs discovered the harm in "late 1999," and the complaint was not filed until October 2003.

Plaintiffs' attempt to salvage their claims by arguing for the application of equitable tolling of the statute of limitations. They claim that a tolling of the statute of limitations is proper because Defendants took steps to intentionally conceal their identity making it impossible to discover the party that caused the harm. "Sogecable had no way of knowing that NDS...[was] secretly working to undermine its conditional access system..." Opposition at 19. Not only do the FAC and the Opposition not carry the burden of showing the application of equitable tolling, but the FAC on its face contradicts the assertions that Plaintiffs advance in favor of tolling.

Equitable tolling in this context requires intentional concealment. *Bernson v. Browning-Ferris Indus. of Calif*, 30 Cal.Rptr.2d 440, 446 (Cal. 1994). The only allegation that Plaintiffs point to in order to show intentional concealment is that they used Al Menart's website to disseminate the code anonymously. Opposition at 17-18. However, the FAC directly contradicts the assertion that the code on the website was from an unknown source. "The code was viewed as 'legitimate' within the hacker community because it was known to have been from an NDS operative." FAC ¶ 45. Plaintiffs never plead any other facts in the complaint nor make any other arguments in their opposition that, if true, would establish intentional concealment by Defendants.

Plaintiffs argue that there is a set of wrongs that are "self-concealing" and for those wrongs it is unnecessary to show specific intentional concealment on the part of a particular defendant. The cases that Plaintiffs cite for this proposition are inapposite. The language quoted from *Hobson v. Wilson*, 737 F.2d 1, 34 (D.C. Cir. 1984), concerns an inability to know that the actual wrong was committed, not the identity of the wrongdoer.

> [W]e conclude that defendants must engage in some misleading, deceptive or otherwise contrived action or scheme, in the course of committing the wrong, that is designed to mask the existence of a cause of *action*. The deception may be as simple as a single lie or as complex as that which we confront here, so long as the defendants conceal *not only their involvement, but the very conduct itself*.

Id. at 34-35 (emphasis added). There is no question that Plaintiffs were aware of the conduct – the compromise of the security system – by late 1999. They were only unaware of the ultimate wrongdoer and perhaps details of how the compromise was carried out by that wrongdoer. Plaintiffs' citation to *Bernson* does nothing to describe the conduct that in this case would constitute intentional concealment and certainly does not reach the conclusion that Plaintiffs seek here. Furthermore, the Ninth Circuit has rejected the idea that fraudulent concealment can be found without active steps on the part of the defendant. "Fraudulent concealment necessarily requires active conduct by a defendant, above and beyond the wrongdoing upon which the plaintiff's claim is filed, to prevent the plaintiff from suing in time." *Santa Maria v. Pacific Bell*, 202 F.3d 1170, 1177 (9th Cir. 2000).

In addition, facts alleged in the FAC itself contradict Plaintiffs' arguments that it was not possible through diligence to discover the identity of NDS as the alleged wrongdoer. Besides the already referred to allegation that the code was known to have come from an NDS operative, the FAC also makes extensive reference to a prior lawsuit involving almost identical facts pursued by Plaintiffs' licensor, Canal+, *Group Canal+ S.A. et al. v. NDS Group PLC et al.*, Case No. 02-CV-01178 (N.D. Cal. filed March 11, 2002). It is through this lawsuit, and the Canal+ investigation that led to it, that Plaintiffs were first informed of NDS's involvement in the alleged wrongdoing. FAC ¶ 25.

Canal+ was obviously able to discover the identity of NDS. In fact, the FAC states that Plaintiffs relied on Canal+ to investigate the identity of the person or group that compromised the security system which led to the claims Plaintiffs raise here. FAC ¶ 23. At oral argument, Sogecable attempted to differentiate their situation by pointing out that they are not a manufacturer of the technology, they are just a user. However, Sogecable knew in late 1999 that the counterfeit access cards were in circulation and appear from the facts alleged in the complaint to have relied on another party to investigate those facts. This is not consistent with the reasonable diligence required to toll the statute of limitations.

In this case, Plaintiffs have sat back and relied on another to investigate and pursue their claims and yet now argue that their claims are barred by neither the statute of limitations or res judicata. The Court declines to accept this position. It is up to the harmed party to pursue his own claim. If Plaintiffs chose to delegate this responsibility to Canal+, they took the risk that Canal+ might not effectively prosecute Plaintiffs' claims or even keep Plaintiffs informed. Any failings on the part of Canal+ in investigating and prosecuting Plaintiffs' claims are not grounds for tolling of the statute of limitations.

B. Civil RICO

The alleged facts on which Plaintiffs' Civil RICO claims are based are similar to those in related case, *Echostar Satellite Corp. et al. v. NDS Group PLC et al.*, Case No. SACV 03-950 DOC (ANx). Therefore, the Court will repeat some of its reasoning and conclusions from the order with regard to the motion to dismiss filed in that case.

To state a claim under 18 U.S.C. § 1962(c), a plaintiff must plead the existence of an "enterprise" that is engaged in a pattern of racketeering activity or collection of unlawful debt. The RICO statute defines "enterprise" to mean (1) "any individual, partnership, corporation, association, or other legal entity," and (2) "any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4).

In this case, Plaintiffs RICO claim is based on an enterprise of the second variety. The Supreme Court has held that an associated in fact enterprise under RICO must (1) have an ongoing formal or informal organization and (2) function as a continuing unit. *See United States v. Turkette*, 452 U.S. 576, 583, 101 S.Ct. 2524, 2528 (1981). The law of the Ninth Circuit further requires that the "organization, formal or informal,...be an entity separate and apart from the pattern of racketeering activity in which it engages." *Chang v. Chen*, 80 F.3d 1293, 1298 (9th Cir. 1996).

In its FAC, Plaintiffs allege two separate structures: (1) a "distribution and sales" structure headed by one Al Menart, who is not named as a defendant in this action and (2) a "technology" structure essentially comprised of NDS and its direct employees and agents. To determine whether the allegations meet the RICO enterprise requirement, the critical question for the Court is whether Plaintiffs have sufficiently alleged a higher criminal structure the controls both the distribution and technology sub-structures. They have not.

The specific allegations of the FAC must be examined to determine whether a sufficient enterprise has been alleged. The only attempt Plaintiffs make to connect the two structures – the distribution and technology structures – is this remarkably conclusory statement:

> On information and belief, the association of Defendants, Participants and/or their agents has an organizational strucutre or system of authority for making an implementing decisions and for exercising common control over its members.

FAC ¶ 93.

Plaintiffs try to assert that the FAC alleges that "NDS organized, supervised, and directed these various individuals, corporations, and business entities into two separate groups within the RICO scheme – a technology structure and a distribution/sales structure." Opposition at 11, ln. 18-21. An examination of the cited paragraphs of the FAC show that they allege no such control by NDS. There are absolutely no alleged facts that, if true, would show an overarching control structure over both the technology structure and the distribution structure.

While citing no caselaw, Plaintiffs claim that "NDS's participation alone is sufficient to establish an ascertainable structure separate from the pattern of racketeering activity." Opposition at 11, ln. 16-18. As discussed at length in the order in the related case, this is not the law. The Ninth Circuit recently found that allegedly organized racketeering activity involving a corporate participant did not meet the separate structure requirement. *See Wagh v. Metris Direct, Inc.*, 348 F.3d 1102, 1111-12 (9th Cir. 2003). Therefore, the mere inclusion of an alleged corporate associate is not enough to show a criminal enterprise.

Plaintiffs have failed to adequately allege a criminal enterprise as defined by 18 U.S.C. § 1961 and by Ninth Circuit precedent and therefore fail to allege the essential elements of their 18 U.S.C. § 1962(c) civil RICO claim.

IV. DISPOSITION

For the reasons given above, the Court GRANTS the motion to dismiss. If the complaint can be amended to state a valid, non-barred claim, the amendment must be made within 30 days of this order.

IT IS SO ORDERED.

DATED: DECEMBER 22, 2003

/s/ David O. Carter
DAVID O. CARTER
United States District Judge

APPENDIX D

ORDER OF THE COURT OF APPEALS DENYING REHEARING AND REHEARING EN BANC

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SOGECABLE, SA; CANALSATELITE DIGITAL, S.L.,

Plaintiffs-Appellants,

v.

NDS GROUP PLC; NDS AMERICAS, INC.,

Defendants-Appellees.

No. 04-56990

D.C. No. CV-03-01174-DOC, Central District of California, Santa Ana

ORDER

Before: B. FLETCHER, FERNANDEZ, and GRABER, Circuit Judges.

The panel has voted to deny the petition for panel rehearing. Judge Graber has voted to deny the petition for rehearing en banc and Judges B. Fletcher and Fernandez have so recommended.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on it.

The petition for panel rehearing and petition for rehearing en banc are DENIED.

FILED Feb 21, 2007.
Cathy A. Catterson, Clerk, U.S. Court of Appeals

FILED
AUG 13 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

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No. 06-1648

IN THE

Supreme Court of the United States

NDS GROUP PLC; NDS AMERICAS, INC.,

Petitioners,

v.

SOGECABLE, S.A.; CANALSATÉLITE DIGITAL, S.L.,

Respondents.

**On Petition Writ of Certiorari to the
United States Court of Appeals
For The Ninth Circuit**

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

DAVID S. ELKINS
RODNEY R. PATULA
SQUIRE, SANDERS &
DEMPSEY, LLP
One Maritime Plaza
Suite 300
San Francisco, CA 94111
(415) 954-0200

PIERRE H. BERGERON
(*Counsel of Record*)
SQUIRE, SANDERS &
DEMPSEY, LLP
312 Walnut Street
Suite 3500
Cincinnati, OH 45202
(513) 361-1200

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

QUESTIONS PRESENTED

1. Respondents allege two RICO enterprises – a "Technology Enterprise" and a "Distribution Enterprise." Petitioners challenge only the former. The questions presented are:

> (a) Whether the Technology Enterprise, which involves parent and subsidiary corporations from different countries allegedly playing distinct roles, in association in fact with a separate group of computer hackers and pirates, is distinct from the RICO "person," which the complaint alleges is the parent corporation.
>
> (b) Whether the Technology Enterprise alleged in the complaint can qualify as a RICO "enterprise" separate and distinct from the alleged pattern of racketeering activity because, *inter alia*, the enterprise had purposes and functions other than the pursuit of the criminal activities, and the participants in the enterprise had assigned roles, dictated in hierarchical manner by the RICO person.

2. Whether summary reversal is required on statute of limitations grounds because the circuit panel purportedly misapplied a rule governing accrual of claims, when in fact the panel applied equitable principles to toll the limitations periods based on allegations in the complaint of both active concealment by Petitioners and reasonable diligence by Respondents to discover the identity of the tortfeasors.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent Sogecable, S.A. is a publicly-traded corporation. The following publicly-held corporations each owns more than 10% of Sogecable, S.A.'s stock: Telefónica, S.A., and Promotora de Informaciones, S.A. (also known as Grupo PRISA).

Sogecable, S.A. owns more than 10% of Respondent CanalSatélite Digital, S.L., a corporation.

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RESPONDENTS' BRIEF IN OPPOSITION

INTRODUCTION

Petitioners' effort to convince this Court to accept this case contrasts with their belittling the Ninth Circuit memorandum decision in related litigation: "[T]he unpublished *Sogecable* disposition did not alter Ninth Circuit law. Indeed, [plaintiff in this related case] cannot even properly cite [the disposition]."[1] If the Ninth Circuit's memorandum decision heralded no change in the circuit's law and, under Ninth Circuit Rule 36-3(c), future litigants cannot even cite it within the circuit, then the decision can hardly be worthy of this Court's attention.

Underscoring the lack of importance of this case is Petitioners' concession, Pet. 7 n.2, that they challenge only one of the two RICO enterprises alleged by Respondents. In other words, even if Petitioners prevailed, it would not dispose of the RICO count and the district court would still have to adjudicate the claim on remand, rendering a trip to this Court a largely academic exercise.

Perhaps cognizant of those problems, Petitioners devote nearly all their attention to chronicling two purported circuit splits. But they do so without tying those supposed splits to the case at hand. Petitioners first insist that a split exists on whether a parent together with a subsidiary or agent can constitute a RICO "enterprise." Closer inspection of the authority featured by Petitioners reveals that the circuits agree that separate and distinct corporate subsidiaries and/or agents can be part of a RICO enterprise that includes a parent corporation. Respondents' allegations of the distinctions between the various entities comprising the enterprise and the RICO person satisfy the tests prevailing in all circuits.

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[1] NDS' Memo. in Opp. to Pl.'s Mtn for Reconsid. of Prev. Order Dismissing Claims at 4, *Echostar Satellite Corp v. NDS Group PLC*, No. SA CV 03-950 DOC(JTL) (C.D. Cal. 2007). This Court may take judicial notice of other filings in federal court by Petitioners.

Petitioners' second RICO question fares no better. The question was not addressed by either of the lower courts in this case – and for good reason. Even assuming a debate over the separate "structure" requirement, the allegations of Respondents' complaint readily satisfy all prevailing formulations of the requirement. Unlike an "informal group" that may not pass muster in some courts' eyes, the complaint here alleges a structure separate from the conduct of criminal activity. The enterprise pursued both legitimate and criminal ends, and was a highly organized and effective association-in-fact. Under the tests controlling in the circuits that Petitioners depict as contrary to the test in the Ninth, such allegations are sufficient.

Finally, Petitioners insist that this Court should summarily reverse the Ninth Circuit's judgment on a question about the statute of limitations. Petitioners neglect to reveal in their Petition, however, that the Ninth Circuit's decision on the statute of limitations turned on equitable doctrines – not on the accrual question addressed in the Petition. By confusing those two issues, Petitioners invite review of a question not even presented by the circuit's decision. Moreover, the Petition, if granted, would result in this Court's review of state law statute of limitations issues, and require an evaluation of whether factual allegations warrant equitable tolling on such state law claims. Such matters do not beckon this Court's scrutiny.

The Petition should be denied.

STATEMENT OF THE CASE

A. Factual Background

Petitioners NDS Group PLC ("NDS") and NDS Americas, Inc. ("NDSA") provide security services and technology to satellite television providers, ensuring that only paid subscribers can view the encrypted programs.

Respondents Sogecable, S.A. and CanalSatélite Digital, S.L., which are satellite television providers, licensed similar security technology from a competitor of Petitioners.

To gain a competitive advantage, NDS hacked its competitors' security systems, including those licensed by Respondents. The plan ultimately evolved into creating and distributing software and hardware that would allow a licensee's current and potential customers to illegally pirate its encrypted television programs.

NDS organized two ventures to execute its scheme. To hack the security technology, NDS set up a high-tech laboratory and research facility in Haifa, Israel. This laboratory was staffed by a team of experienced hackers and pirates, ostensibly charged with researching NDS' own vulnerabilities, but secretly used to hack and sabotage its competitors' technologies. Two accomplished hackers, Christopher Tarnovsky and Oliver Kommerling, led the so-called "Haifa Team." The Ninth Circuit described them as "individuals who appear to be independent contractors . . . hired to hack the encryption code." Pet. App. 5a.

The Haifa Team successfully hacked NDS' competitors' security systems over a period of years. This was no simple exercise, requiring the electrical and optical examination of encrypted software that its owners had devoted substantial resources to protect. The venture, comprised of NDS, its U.S subsidiary and the Haifa Team, including the specially engaged hackers, was an association-in-fact enterprise referred to below as the "Technology Enterprise."

The second enterprise alleged was the "Distribution Enterprise." NDS transferred the hacked code – that is, the fruits of the Technology Enterprise – to Mr. Tarnovsky, who was based in Los Angeles with NDSA, and directed Mr. Tarnovsky to create and distribute software and hardware that would allow customers to illegally pirate satellite television using the hacked code. NDS directed NDSA to transmit the hacked code, through Mr. Tarnovsky, to Alan Menard, in

Canada, who posted it on his website, www.dr7.com. That website served as a clearinghouse for hackers and pirates on methods to steal encrypted satellite signals.

Mr. Menard sat in a unique position to widely distribute the code and software through his website while concealing the source of the hacked code to the outside world. NDS also directed Messrs. Tarnovsky, Menard and others to help develop, manufacture, or distribute devices that consumers could use to circumvent its competitors' security systems. The distribution efforts inflicted substantial harm upon Respondents.

The Petition challenges the legal sufficiency of the Technology Enterprise only.

B. Summary of the Proceedings Below

Petitioners' efforts succeeded not only in accomplishing the desired results, but also in concealing their involvement in the affair. Indeed, the enterprises alleged by Respondents were designed by NDS to prevent others from tracing counterfeit access cards detected in the marketplace back to their true source, NDS and the operations of the two enterprises that it had created and directed. After Respondents discovered Petitioners' complicity, they sued Petitioners for violating federal and state laws, along with a count for violating the Racketeer Influenced and Corrupt Organizations Act ("RICO"). The complaint identifies NDS as the sole RICO "person," and it alleges the two separate "enterprises" – the Technology Enterprise and the Distribution Enterprise – described above.

The district court dismissed Respondents' state law and federal, non-RICO claims because it refused to equitably toll the limitations periods applicable to them. It also dismissed the RICO claims, finding that: (a) Respondents had not alleged sufficient control by the RICO person, NDS, over the Distribution Enterprise to state a RICO claim; and (b) the Technology Enterprise claim was improper because it was "nothing more than a subset" of NDS. Pet. App. 25a-28a. These findings were largely dependent on the district court's conclusion that Respondents' first and second amended complaints were contradictory, and that the earlier complaint should control.

The Ninth Circuit reversed in an unpublished and non-precedential opinion. First, it equitably tolled the statute of limitations because Respondents "were diligent until they learned [Petitioners'] identities." Pet. App. 3a. Second, it held that both of the RICO enterprises were viable, finding that (a) Respondents had sufficiently pled NDS' control over the Distribution Enterprise; and (b) NDS was sufficiently distinct from the Technology Enterprise since "the enterprise consisted of two separate corporations—one existing under the laws of the United Kingdom [NDS] and one existing under the laws of the State of Delaware [NDSA]—and individuals who appear to be independent contractors (the Haifa Team) hired to hack the encryption code." Pet. App. 4a-5a. Unlike the district court, the Ninth Circuit viewed the allegations in the light most favorable to Respondents and considered the facts alleged in the later complaint (after deeming the two complaints harmonious). *See* Pet. App. 4a-5a.

Petitioners misstate the holding of the Ninth Circuit regarding the statute of limitations issue, claiming that it held that "the statute of limitations period begins only when the identity of the alleged injurer is discovered, rather than when the injury is discovered." Pet. at 4. In so doing, Petitioners conflate the accrual of claims with the separate doctrine of equitable tolling. The Ninth Circuit held that "under both federal and California law, equitable tolling protects a plaintiff who does not know, and even exercising reasonable diligence could not know, *who* caused the harm that is the subject of the complaint." Pet. App. 2a-3a. Respondents' allegations in their complaint about Petitioners' efforts to conceal the scheme, along with Respondents' diligence to uncover it, convinced the Ninth Circuit that equitable tolling was warranted. Petitioners do not discuss equitable tolling at all in their Petition.

REASONS FOR DENYING THE PETITION

I. This Case Does Not Squarely Present The RICO Questions Raised by the Petition

At the same time that Petitioners invite review over two RICO questions, they acknowledge that the answers to these questions will not be dispositive of the RICO count in this case. Pet. at 7 n.2. Respondents presented two RICO enterprises, but Petitioners challenge only one. Even leaving aside that concession, neither of the issues presented in this case warrant review in their own right. Both issues implicate factual allegations that, if accepted as true, would satisfy the tests on all sides of the alleged circuit splits.

A. The Technology Enterprise Is Distinct From the RICO Person

The Ninth Circuit held that the RICO person alleged by Respondents is distinct from the Technology Enterprise because the enterprise consisted of the RICO person and two entities distinct from the RICO person. This case does not present a parent corporation and a largely indistinguishable subsidiary as the RICO enterprise, where the subsidiary is a mere instrumentality of the parent, with no distinct business activities or purpose; rather, NDS and NDSA are very different corporations, both in purpose and operations. NDS, a U.K. company with broad experience in developing technology, controlled and directed the Technology Enterprise. NDSA, a U.S. company concerned with sales and customer support, provided links with the Distribution Enterprise and an American base for Mr. Tarnovsky to direct both the Technology and Distribution Enterprises.

The Haifa Team, however, is equally important to the distinctiveness issue. It encompassed "individuals who appear to be independent contractors . . . hired to hack the encryption code." Pet. App. 5a. The district court was reversed largely because it treated the Haifa Team as a normal and ordinary part of NDS' business. Viewed in a light appropriate for a motion to dismiss, however, the Haifa Team is a unique and separate but organized group distinct from NDS under the law of every circuit and under the underlying rationale of *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163 (2001). The Ninth Circuit accordingly had no occasion to dwell on potential disagreements among the circuits when the Technology Enterprise here would satisfy any of the tests.

Petitioners' authorities – nearly all of which predate this Court's decision in *Cedric Kushner* – confirm that the Technology Enterprise is sufficiently distinct from NDS under the law of all circuits. Petitioners tout their first case, *Gasoline Sales v. Aero Oil Co.*, 39 F.3d 70 (3d Cir. 1994), as an example of a case that "applies a bright-line rule." Pet. at 16. *Gasoline Sales* relies upon the general rule that "the actions of a corporation's agents in conducting its normal affairs are constructively its own actions for section 1962(c) purposes." *Id.* at 73. Yet, recognizing that a corporation could never be a RICO defendant if "agents" were broadly construed, the court explained that even a subsidiary corporation (not to mention an "agent") can be sufficiently different from the parent if it has a "distinctive and separate role." *Id.* at 73-74.

The relationship (and separateness) among NDS, NDSA, and the Haifa Team is a far cry from *Gasoline Sales*, where the parent and its subsidiaries were virtually indistinguishable. *See also Emcore Corp. v. PricewaterhouseCoopers LLP*, 102 F. Supp. 2d 237, 261 (D.N.J. 2000) ("[T]his court agrees that the conception that a corporation must always act through its agents has become outdated by Third Circuit analysis . . . a corporation can be a RICO defendant, so long as the corporation's actions are separable from those of its agents."). Mr. Tarnovsky and the Haifa Team are quintessentially "distinctive and separate" actors. *Cedric Kushner*, 533 U.S. at 166 (endorsing approach under RICO that "the corporation and its employees are not legally identical").

This crucial distinction between the creation of a covert and separate group of operatives engaged for a series of highly specialized and illegal acts and the use of an indistinguishable subsidiary to perform standard business tasks distinguishes this case from all of the other cases featured by Petitioners to establish their "split." For example, *Khurana v. Innovative Health Care Sys., Inc.*, 130 F.3d 143, 155 (5th Cir. 1997), turned on the finding that plaintiff "did not plead any distinct roles for the subsidiary." Far from applying a "bright-line rule" as suggested by Petitioners, the Fifth Circuit appreciated that a plaintiff could "plead . . . distinct roles for the subsidiary . . . and the parent corporation" in order to bestow them with the necessary "distinctiveness." *Id.* at 155-56. The Fifth Circuit subsequently appreciated that the distinctiveness requirement could also be satisfied when the enterprise acted outside the normal course of business. *See Whelan v. Winchester Prod. Co.*, 319 F.3d 225, 230 (5th Cir. 2003) (focusing on the fact that "the predicate acts . . . such as mailing false production reports, were committed . . . in the ordinary course of business"). The Ninth Circuit hardly needed to disagree with *Khurana* or *Whelan* to find that the Haifa Team was "distinct" from NDS or performed a unique function, and that the same holds true for NDSA.

In *United States v. Computer Sci. Corp.*, 689 F.2d 1181 (4th Cir. 1982), the court found that a corporate division (not even a separate legal entity), alleged as the entire RICO enterprise, was insufficiently distinct from the corporation, the RICO person. There was no allegation that this division was somehow distinct from the corporation or performed any unique function. In *NCNB Nat'l Bank v. Tiller*, 814 F.2d 931, 936 (4th Cir. 1987), the alleged enterprise was merely a holding company. Again, there was no allegation that the "bank holding company" played even the smallest role in the scheme run by the corporation, the RICO person. *Id.*

Cases from the Seventh Circuit rely on similar principles. *Fitzgerald v. Chrysler Corp.*, 116 F.3d at 225 (7th Cir. 1997), dealt with a claim that Chrysler and its dealers were a RICO enterprise. But the Seventh Circuit appreciated that the dealers played no material role in the scheme because Chrysler dealt "with its dealers and other agents in the ordinary way, so that their role in the manufacturer's illegal acts is *entirely incidental.*" *Id.* at 227-28 (emphasis added). The dealers were "merely a conduit" with nothing but an "incidental role in the alleged fraud." *Id.* The other Seventh Circuit cases cited by Petitioners, *Baker v. IBP, Inc.*, 357 F.3d 685 (7th Cir. 2004), and *Bachman v. Bear, Stearns & Co*, 178 F.3d 930 (7th Cir. 1999), were not even faced with the question of an indistinct subsidiary (let alone anything like the Haifa Team). In *Baker*, the enterprise did not have a common purpose and the RICO person had not created or manipulated any other distinct entity. *Baker*, 357 F.3d at 691. In *Bachman*, the plaintiff's claims failed to allege organization or control of the enterprise. *Bachman*, 178 F.3d at 932.

Petitioners' cases from the First, Second, Eighth, and Tenth Circuits do not part company with the other circuits. *See, e.g., Bessette v. Avco Fin. Servs.*, 230 F.3d 439, 449 (1st Cir. 2000); *Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.*, 30 F.3d 339, 344 (2d Cir. 1994); *Fogie v. THORN Ams., Inc.*, 190 F.3d 889 (8th Cir. 1999); *Board of County Comm'rs v. Liberty Group*, 965 F.2d 879, 885-86 (10th Cir. 1992).

Several of those cases actually rely upon authority that Petitioners present as in conflict. *See Bessette*, 230 F.3d at 449 (agreeing with Seventh Circuit); *Riverwoods*, 30 F.3d at 344 (citing Third, Fourth, and Fifth Circuit authority). Similar to the other circuits, those cases require some minimal showing of distinctiveness for the subsidiary or the agent – such as allegations that the subsidiary or agent was not merely an extension of the parent or simply conducting the parent's regular business affairs. Nor do Petitioners cases allegedly holding that a subsidiary or agent "always" constitutes an enterprise hold to the contrary. *See, e.g., Living Designs, Inc. v. E.I. DuPont de Nemours & Co.*, 431 F.3d 353, 361 (9th Cir. 2005) ("[T]here is no question that law firms retained by DuPont are distinctive entities."); *Davis v. The Mutual Ins. Co. of N.Y.*, 6 F.3d 367, 377 (6th Cir. 1993) ("The record is replete with evidence from which the jury could reasonably conclude that FIA was a distinctive entity. . .").

There is no conflict among the circuits and the holding of the Ninth Circuit in this case given the allegations of Respondents' complaint. And certainly none of these cases find that "independent contractors," as the Ninth Circuit described the Haifa Team, are insufficiently distinct from a corporation to comprise part of a RICO enterprise.

In fact, any differences in the various articulations of "enterprise" are more semantics than substance. Regardless, Respondents allege sufficient distinctiveness in the enterprise to satisfy the test in any circuit. The Technology Enterprise is what the Seventh Circuit would describe as the prototypical RICO enterprise, where a "previously legitimate" "firm's resources, contacts, facilities, and appearance of legitimacy" are used "to perpetrate more, and less easily discovered, criminal acts." *Fitzgerald*, 116 F.3d at 227. NDS exploited its ability to utilize a separate and distinct unit made up of expert hackers and known criminals, supply them with expensive equipment and facilities, and then compartmentalize the unit and other aspects of the enterprise, all to avoid discovery. *See id.* at 227-28. There is no question that Respondents allege an enterprise distinct from the RICO "person."

Respondents' allegations on the Technology Enterprise more than meet the distinctiveness requirements under all the circuit formulations to which the Petition directs attention. This case is therefore inappropriate for resolving whatever circuit split may exist on that issue.

B. The Ninth Circuit's Decision Does Not Present the Question of Whether A RICO Enterprise Must Have a Structure Separate from the Alleged Pattern of Racketeering Activity

Petitioners do not even attempt to argue that this case implicates the purported "separate structure" split. For all of their discussion of the split, they fail to explain why it matters in the context of this case. It does not. Indeed, neither of the lower courts addressed this question.[2]

That may be because the allegations in the complaint are plain: "Those enterprises existed and exist as an on-going entity *separate and apart from the pattern of racketeering activity*, including the conspiratorial racketeering, in which the enterprises engaged and/or by which the enterprises were operated." Sec. Am. Compl. ¶ 167 (emphasis added). Petitioners even vouch for the separateness between the Technology Enterprise itself and the racketeering pattern by suggesting legitimate purposes and functions for the enterprise, such as scrutinizing NDS' own technology for possible security gaps. Pet. at 5-6. And they acknowledge that the circuits with whom they agree simply require "an allegation that the enterprise has a structure that exists apart from the pattern of racketeering activity." Pet. at 21. The Petition neglects to explain how the allegation in paragraph 167, among others, fails that test.

Beyond those points, the complaint adequately alleges a structure for the Technology Enterprise apart from the criminal activity. NDS organized and managed each member of the Technology Enterprise, including NDSA, Mr. Tarnovsky (who was given an American situs at NDSA), Mr.

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[2] Petitioners intimate that the district court actually reached this question, but this suggestion conflicts with their brief to the Ninth Circuit, where, at page 45, they maintain that this issue was "not reached by the district court."

Kommerling, and the Haifa Team, to ensure that the enterprise functioned cohesively and contributed to the larger plan. This enterprise was structured to be useful to both NDS' legitimate businesses interests and its criminal endeavors, and operated from at least 1996 until 1999.

Thus, the Technology Enterprise was used both to research the vulnerabilities of NDS' own technology and to secretly and illegally hack and sabotage that of its competitors' over a period of years. This highly organized and competent enterprise certainly meets the requirement in Petitioners' lead case, *United States v. Bledsoe*, 674 F.2d 647, 663 (8th Cir. 1982), that "the enterprise must be more than an informal group created to perpetrate the acts of racketeering." Likewise, it satisfies the test in *United States v. Riccobene*, 709 F.2d 214, 223-24 (3d Cir. 1983), that an enterprise must have "an existence beyond that which is necessary merely to commit each of the acts charged as predicate racketeering offenses. The function of overseeing and coordinating the commission of several different predicate offenses and other activities on an on-going basis is adequate to satisfy the separate existence requirement."

The balance of Petitioners' authority is in similar vein. *See, e.g., Richmond v. Nationwide Cassel L.P.*, 52 F.3d 640, 645 (7th Cir. 1995) ("there need not be much structure, but the enterprise must have some continuity and some differentiation of the roles within it"); *United States v. Sanders*, 928 F.2d 940, 943 (10th Cir. 1991) (relying on the test in *Riccobene*). As a result, this Court's decision on whether or not a separate structure is needed would not affect the outcome of this case.

C. This Case Is a Poor Vehicle for Certiorari

Several factors render this case ill-suited for review by this Court. The RICO count featured in the Petition is not case-dispositive, and further proceedings and record development will be required on the other federal and state law causes of action. That the case sits at the pleading stage without the benefit of discovery (and, indeed, when many participants in the scheme and their roles remain unknown to Respondents) counsels against certiorari. *See Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 257-58 (1916) (recognizing that certiorari is generally unwise when the facts of the case are not settled).

And even if Petitioners prevailed on the RICO questions presented, that would not spell the demise of Respondents' RICO claim. Petitioners admit that "Sogecable also alleged a 'distribution enterprise,' but the allegations there *do not implicate the questions presented by this petition.*" Pet. 7 n.2 (emphasis added). Because the complaint presents two separate RICO enterprises, challenging only one ensures that Petitioners will face a RICO claim even if the other enterprise were deemed insufficient. *See The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959) ("While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial.").

As noted above, moreover, the Ninth Circuit's ruling was an unpublished disposition, which Ninth Circuit rules prohibit parties from citing. 9th Cir. R. 36-3(c). This explains why Petitioners were able to convince the same district court in another case to disregard the Ninth Circuit's decision in this case.[3] Petitioners cannot have it both ways – dismissing the decision as irrelevant in one forum but proclaiming it as a case of national importance before this Tribunal.

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[3] Order Granting Pl.'s Mtn for Reconsideration at 5, Doc. #403, *Echostar Satellite Corp v. NDS Group PLC*, No. SA CV 03-950 DOC(JTL) (C.D. Cal. 2007) (agreeing with NDS that *Sogecable* disposition "is not precedent and thus, does not change circuit law").

II. As Petitioners Admitted at Oral Argument, the Statute of Limitations Is Equitably Tolled Where a Plaintiff Could Not Know, Despite Reasonable Diligence, Who Caused the Injury

Petitioners claim that the Ninth Circuit held that state and federal statutes of limitations begin only when the plaintiff discovers the identity of the defendant. Pet. at 4, 24. This is a misstatement. Petitioners confuse the accrual of a claim, which begins the statute of limitations, and the tolling of the limitations period, which suspends it. The Ninth Circuit invoked equitable tolling to suspend the limitations period, rather than find that the claim had not accrued: "Because--on the facts as pleaded--Plaintiffs were diligent until they learned Defendants' identities, the period of time before March 12, 2002, is equitably tolled and added to the end of the limitations period." Pet. App. 3a.

Because Petitioners attack the wrong legal theory, the cases they cite, such as *United States v. Kubrick*, 444 U.S. 111 (1979), are inapposite. *Kubrick* rejected the argument that accrual does not begin until the plaintiff "receives or perhaps forms for himself a reasonable opinion that he has been wronged . . . [because] if a claim does not accrue until a plaintiff is aware of his injury and its cause, neither should it accrue until he knows or should suspect that the doctor who caused his injury was legally blameworthy." *Id.* at 118. This Court held that accrual did not wait on legal advice, but that a claim accrues once a plaintiff knows of his injury and its cause. It did not address equitable tolling.

The Ninth Circuit's decision has nothing to do with *Kubrick*. The circuit held that "under both federal and California law, equitable tolling protects a plaintiff who does not know, and even exercising reasonable diligence could not know, *who* caused the harm that is the subject of the complaint." Pet. App. 2a-3a. Petitioners' challenge here to this holding and their request for summary reversal are especially strange because their counsel *admitted* during oral argument that this was a correct statement of law. *Id.* at 2a.

The ruling below is unexceptional. It has long been accepted that "[t]ime requirements in lawsuits between private litigants are customarily subject to 'equitable tolling.'" *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95 (1990), citing *Hallstrom v. Tillamook County*, 493 U.S. 20, 27 (1989); *see also Rotella v. Wood*, 528 U.S. 549, 560-561 (2000) ("[W]e do not unsettle the understanding that federal statutes of limitations are generally subject to equitable principles of tolling . . . and where a pattern remains obscure in the face of a plaintiff's diligence in seeking to identify it, equitable tolling may be one answer to the plaintiff's difficulty."). The Ninth Circuit correctly applied equitable tolling to Respondents' claims given the great pains Petitioners took to conceal their responsibility and given that Respondents exercised diligence and acted when they learned of Petitioners' involvement.

Petitioners identify no confusion amongst the lower courts in either applying the accrual rule or equitable tolling that would justify this Court's intervention. In fact, counsel's concession on the latter point should end the inquiry. At worst, this case presents a question of "the misapplication of a properly stated rule of law," which should not justify certiorari or summary reversal. S. Ct. R. 10. But Petitioners fail to even argue that the Ninth Circuit misapplied the doctrine of equitable tolling.

The Ninth Circuit panel had before it ample allegations to invoke equitable tolling. Equating Respondents' efforts to the "investigative approach" "used by drug enforcement agents," the panel observed that Respondents had filed multiple (actually hundreds of) claims against parties engaged in counterfeiting, collaborated with Spanish law enforcement officers to try to thwart the hackers, and hosted seminars to draw attention to the problems of piracy. Pet. App. 3a. Respondents also worked with others to share information about hackers and possible countermeasures, all in an effort to learn what Respondents eventually did learn, but not until 2002. *Id.* When juxtaposed with Petitioners' efforts at concealing their activities – including the use of "code names," preventing participants from disclosing their knowledge about the scheme, and working with known hackers – this case is a model one for applying equitable tolling.

Finally, reviewing this issue would require this Court to trespass into state law realms with no federal constitutional or other connection to federal law or policy. The complaint presents state law causes of action for intentional interference with contract and tortious interference with prospective economic advantage. Petitioners invite this Court to rule that the Ninth Circuit misapplied California law of equitable tolling to toll the statutes of limitations on those state law claims. No federal question is implicated with respect to these two counts.

The statute of limitations issue raised by Petitioners does not warrant certiorari, much less the summary reversal invited by Petitioners.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari and the request for summary reversal should be denied.

Respectfully submitted,

DAVID S. ELKINS
RODNEY R. PATULA
SQUIRE, SANDERS &
DEMPSEY, LLP
One Maritime Plaza
Suite 300
San Francisco, CA 94111
(415) 954-0200

PIERRE H. BERGERON
(*Counsel of Record*)
SQUIRE, SANDERS &
DEMPSEY, LLP
312 Walnut Street
Suite 3500
Cincinnati, OH 45202
(513) 361-1200

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IN THE

Supreme Court of the United States

NDS GROUP PLC; NDS AMERICAS, INC.,
Petitioners,

v.

SOGECABLE, S.A.; CANALSATÉLITE DIGITAL, S.L.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

EUGENIE C. GAVENCHAK
Deputy General Counsel
News Corporation
1211 Avenue of the Americas
New York, New York 10036

DARIN W. SNYDER
(*Counsel of Record*)
O'MELVENY & MYERS LLP
275 Battery Street, Suite 2600
San Francisco, CA 94111
(415) 984-8846

MARK S. DAVIES
SUSAN M. MOSS
O'MELVENY & MYERS LLP
1625 Eye Street, NW
Washington, DC 20006

Attorneys for Petitioners

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OTHER AUTHORITIES

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REPLY BRIEF FOR PETITIONERS

This Court has already decided that the first question presented by this petition warrants review. The question is whether for purposes of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(c), an "enterprise" may consist solely of a corporate defendant (the "person") and its subsidiaries or agents. Two terms ago, this Court granted certiorari and heard argument on this issue, but ultimately dismissed the writ. *Mohawk Indus. v. Williams*, 411 F.3d 1252 (11th Cir. 2005), *cert. granted*, *Williams v. Mohawk Indus.*, 546 U.S. 1075 (2005), *writ dismissed as improvidently granted*, *Williams v. Mohawk Indus.*, 126 S. Ct. 2016 (2006). This case provides an excellent vehicle finally to resolve the *Mohawk* issue and, at the same time, provides this Court with an opportunity to resolve a second closely related issue on which the courts of appeals are also deeply divided. Certiorari is warranted. Moreover, as we detail in III below, summary reversal is warranted on the statute of limitations ruling.

I. THE FEDERAL COURTS OF APPEALS ARE DEEPLY DIVIDED ON WHETHER A RICO "ENTERPRISE" CAN CONSIST OF ONLY THE RICO PERSON AND ITS SUBSIDIARIES OR AGENTS

A. This Court's Established Practice Is To Grant Review Promptly After A Case Is Dismissed Post-Argument

The Court has a well-established practice of granting prompt review when it has heard argument on an issue but, for case-specific reasons, has not been able to resolve it. Just last term, for example, this Court heard argument on a criminal sentencing issue in *United States v. Claiborne*, 439 F.3d 479 (8th Cir. 2006), *cert. granted*, 127 S. Ct. 551 (2007). After argument, however, petitioner died and the Court vacated the writ. 127 S. Ct. 2245. The Court promptly granted certiorari in another case presenting the same issue. *United*

States v. Gall, 446 F.3d 884 (8th Cir. 2006), *cert. granted*, 127 S. Ct. 2933 (2007). Other examples abound.[1]

B. This Case Is An Excellent Vehicle To Resolve The *Mohawk* Issue

As with *Claiborne* and the other cases noted, review here is appropriate to resolve the important and recurring issue left unresolved by the post-argument dismissal in *Mohawk*. In a startling omission, respondents do not even cite this Court's grant and subsequent dismissal in *Mohawk*, even though *Mohawk* was featured prominently in our petition. *See* Pet. 3 & n.1, 11 & n.3, 12-13, 18. Instead, respondents attempt to cast doubt on whether this case is a suitable vehicle for this Court to consider the question presented. It is.

1. Respondents' primary argument is that the decision below is unpublished. (Opp. 1, 13.) The panel's decision to denote its disposition as unpublished indicates that it was applying settled circuit law. *See* 9th Cir. R. 36-2 ("A written, reasoned disposition shall be designated as an OPINION only if it: (a) Establishes, alters, modifies or clarifies a rule of law."). This Court routinely grants review in unpublished dispositions precisely because of its role in reviewing settled circuit law.[2] The unpublished character of the decision be-

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[1] *See, e.g.*, *Medellin v. Dretke*, 371 F.3d 270 (5th Cir. 2004), *cert. granted*, 543 U.S. 1032 (2004), *dismissed post-argument by Medellin v. Dretke*, 544 U.S. 660, 663 (2005), *cert. granted on same issue in Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006); *Adams v. Florida Power Corp.*, 255 F.3d 1322 (11th Cir. 2001), *cert. granted*, 534 U.S. 1054 (2001), *dismissed post-argument by Adams v. Florida Power Corp.*, 535 U.S. 228 (2002), *cert. granted on same issue in Smith v. City of Jackson*, 544 U.S. 228 (2005); *Lewis v. Brunswick Corp.*, 107 F.3d 1494 (11th Cir. 1997), *cert. granted*, 522 U.S. 978 (1997), *dismissed post-argument by Lewis v. Brunswick Corp.*, 523 U.S. 1113 (1998), *cert. granted on same issue in Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002).

[2] Last term alone involved numerous grants from unpublished cases. *See, e.g.*, *Teleflex, Inc. v. KSR Int'l Co.*, No. 04-1152, 119 Fed. App'x 282 (Fed. Cir. Jan. 06, 2005), *cert. granted*, 126 S. Ct. 2965 (June 26,

low indicates at most that the Ninth Circuit's views on the *Mohawk* issue are settled; it certainly is no bar to review here.

In a related vein, respondents correctly note (at 1, 13) that in other litigation we have suggested that the unpublished decision below did not change Ninth Circuit law. But there is no tension between that commonplace observation about unpublished decisions and our suggestion here that review is warranted. For purposes of trial court litigation in the Ninth Circuit, the decision below is of no value but, at the same time, the settled legal rule applied here warrants this Court's attention because the Ninth Circuit's rule is in conflict with the views of other circuits. Likewise, we have never suggested that this is a "*case* of national importance." ((Opp. 13) (emphasis added).) Instead, the case presents an issue on which the circuits are divided, and it is the circuit division presented here that warrants this Court's attention.

2. Although respondents (at 12) emphasize that the decision below "was at the pleading stage," the procedural posture counsels in favor of review. The legal question here is cleanly presented because all the facts relevant to the legal question are contained in the complaint. Indeed, this Court's

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2006) (No. 04-1350); *PSKS, Inc. v. Leegin Creative Leather Prods.*, No. 04-41243, 171 Fed. App'x 464 (5th Cir. Mar. 20, 2006), *cert. granted*, 127 S. Ct. 763 (Dec. 7, 2006) (No. 06-480), *rev'd*, 127 S. Ct. 2705 (2007); *In re Request of Gov. Camacho Relative to the Interpretation and Application of S. 11 of the Organic Act of Guam*, No. CRQ03-001, 2003 WL 21697180 (Guam July 23, 2003), *cert. granted, Moylan v. Camacho*, 127 S. Ct. 36 (Sept. 26, 2006) (No. 06-116); *MedImmune, Inc. v. Genentech, Inc.*, 427 F.3d 958 (Fed. Cir. 2005), *cert. granted*, 546 U.S. 1169 (Feb. 21, 2006) (No. 05-608); *United States v. Rita*, No. 05-4674, 177 Fed. App'x 357 (4th Cir. May 1, 2006), *cert. granted*, 127 S. Ct 551 (Nov. 3, 2006) (No. 06-5754); *Spano v. Safeco Corp.*, No. 04-35313, 140 Fed. App'x 746 (9th Cir. Aug. 4, 2005), *cert. granted, Safeco Ins. Co. of America v. Burr*, 127 S. Ct 36 (Sept. 26, 2006) (No. 06-84), *rev'd, Safeco Ins. Co. v. Burr*, 127 S. Ct. 2201 (2007).

grant in *Mohawk* itself was at the same pleading stage as this case. There, the defendant moved to dismiss the RICO claims, the district court denied that motion but certified the question for immediate review, and the circuit court affirmed. *Mohawk Indus. v. Williams*, 411 F.3d 1252, 1266 (11th Cir. 2005). Thus, the record before the Court in *Mohawk*, like the record here, was limited to the allegations in the complaint. *See also Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158 (2001) (reviewing district court's dismissal of RICO claims at motion to dismiss stage). Thus, the procedural posture *supports* a grant of certiorari.

3. Contrary to respondents' suggestion, the issue presented has ample practical consequences in this case to warrant review. (Opp. 1.) Resolution of the question presented will determine whether trial will proceed on the Technology Enterprise. That RICO question requires factual discovery on a host of allegations in the respondents' complaint, discovery that will not be necessary should petitioners prevail here.[3] Accordingly, there is no question that the issue has significant practical consequences for the parties. Nothing more is required for an issue to be properly presented. *See* Robert C. Stern et al., *Supreme Court Practice* 231 (8th ed. 2002) ("If the resolution of a clear conflict is *irrelevant* to the ultimate outcome of the case before the Court, certiorari may be denied.") (emphasis added).

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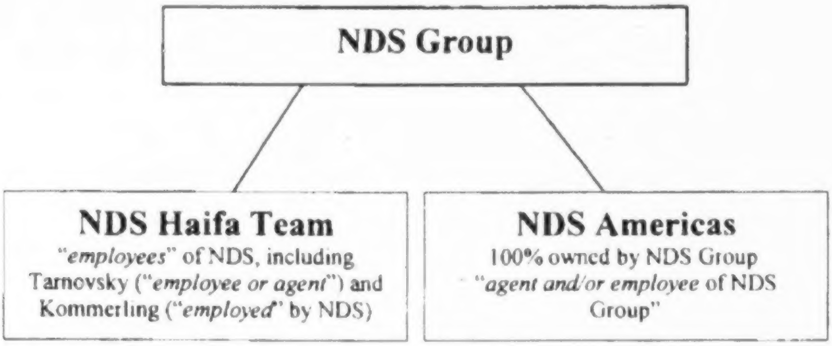
[3] For example, the parties will no longer need to investigate the existence and role of the Haifa Team, including the set-up of the high-tech lab for legitimate purposes and recruitment of the alleged hackers. *See* 2d Am. Compl. ¶¶ 74, 75, 76, 108, 109, 167. Nor would investigation be needed about the alleged efforts of NDS to hack the MediaGuard conditional access system, download the UserROM, create a digital archive file, and transfer this information to NDSA and Tarnovsky with instructions to publish it on the internet. *See* 2d Am. Compl. ¶¶ 80, 81, 82, 85, 92, 130, 173.

4. Respondents suggest that the Technology Enterprise allegations would suffice to state a distinct RICO enterprise under the law of any circuit. (Opp. 2, 7.) To the extent that respondents are attempting to reconcile the circuit law on the *Mohawk* issue, this Court's decision to grant certiorari on the issue provides a complete rejoinder to that claim. In places, however, respondents suggest that the allegations here sufficiently state a RICO claim even if the standards among the circuits diverge. (Opp. 7.) Not so.

In this case, the allegation is that that NDS Group, along with its employees and agents (a.k.a., the Haifa Team)[4] and its wholly owned subsidiary NDS Americas (also labeled an agent or employee of NDS),[5] constitute the Technology Enterprise. For ease of reference, here is an image of the alleged Technology Enterprise:


NDS Group
NDS Haifa Team
"employees" of NDS, including Tarnovsky ("employee or agent") and Kommerling ("employed" by NDS)
NDS Americas
100% owned by NDS Group
"agent and/or employee of NDS Group"

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[4] The Ninth Circuit characterizes the Haifa Team as "independent contractors." (Opp. 10.) The complaint alleges that the Haifa Team members worked for NDS as "employees" or "agents." (2nd Am. Compl. ¶¶ 78, 92, 96 (Tarnovsky was NDS's "employee or agent"); ¶¶ 76, 79, 109 (Kommerling was "hired and paid" by NDS; "work[ed] for" NDS; NDS "employed" Kommerling); ¶ 8 (Haifa Team was "carefully selected employees.").) Independent contractors can of course be agents, even if they are not employees. Restatement (Third) of Agency § 1.01 cmt. c (2006) (finding the term "independent contractor" "equivocal in meaning and confusing in usage" because "some termed independent contractors are agents while others are nonagent service providers.").

[5] *See* 2nd Am. Compl. ¶ 129.

Respondents suggest that the Technology Enterprise allegations can state a RICO claim even in the four circuits—the Third, Fourth, Fifth, and Seventh—that hold a corporation generally cannot be a RICO "person" for conducting an "enterprise" consisting of its own subsidiaries or agents. *See* Pet. 16-18. To be sure, these circuits generally allow that in a "'narrow,' 'theoretical,' and 'rare'" case a corporation may be charged as a RICO person acting through an enterprise of its subsidiaries or agents.[6] But this case is unexceptional, and there is nothing unusual about NDS's activities to warrant applying a narrow exception here. Respondents point to nothing that shows that the enterprise components are any more "distinct" or "separate" from NDS than any other employees, agents or subsidiaries are from a defendant corporation. The case below is a quintessential example of identity of person and enterprise—it is all NDS. The fact that NDSA and the Haifa Team had different functions from NDS is routine in any corporation and does not make this a "'narrow,' 'theoretical,' and 'rare'" case. Indeed, as construed by respondents, the "exception" would become the rule as almost all alleged enterprises would meet this broad exception. The law in these four circuits says otherwise.

II. THE FEDERAL COURTS OF APPEALS ARE DIVIDED 5 TO 4 ON WHETHER "ENTERPRISE" INCLUDES A STRUCTURE REQUIREMENT

1. This case also raises an independent but closely related question about the scope of the "enterprise" requirement in the RICO statute. In *United States v. Turkette*, 452 U.S. 576 (1981), this Court distinguished the "pattern of racketeering activity" from the "enterprise" engaging in that activity. Respondents argue that this "separate structure"

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[6] *See, e.g., Khurana v. Innovative Health Care Sys., Inc.*, 130 F.3d 143 (5th Cir. 1997) (holding that it might be "theoretically possible" for a corporation to play a "separate, active role" than its agents or employees).

requirement does not "matter in the context of this case." (Opp. 11.) But as we explained at length (Pet. 8-10), the question of whether or not respondents need to allege a structure separate from the alleged racketeering activity is presented here.

In dismissing respondents' first amended complaint, the district court expressly held, citing both *Turkette* and then-controlling Ninth Circuit law, *Chang v. Chen*, 80 F.3d 1293 (9th Cir. 1996), *overruled by Odom v. Microsoft Corp.*, 486 F.3d 541 (9th Cir. 2007), that respondents' Technology Enterprise allegations failed to allege a "higher criminal structure." (Pet. App. 36a.) So too, in dismissing the second amended complaint—a complaint that added nothing to the separate structure allegations (*see* 1st Am. Compl. ¶ 94)—the district court explained that "the only structure that the Technology Enterprise is alleged to have is that of NDS Group itself." (Pet. App. 28a.)

Defending the district court's dismissal of the RICO allegations, petitioners argued to the Ninth Circuit that the Technology Enterprise lacked the necessary separate structure allegations. *See, e.g.*, Ct. App. Br. 45 ("Sogecable's inability to allege the required independent decision-making structure within the purported 'Technology Enterprise' provides a separate and independent reason its RICO claim fails.").[7] Although the Ninth Circuit, as we noted (Pet. 9), did not expressly rule on the separate structure requirement, it allowed a RICO claim to proceed without meeting that requirement. (Pet. App. 5a.) This Court reviews judgments, and the separate structure issue is resolved adversely to petitioners by the judgment here. It is necessarily before this Court.

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[7] Respondents are correct that our appellate brief (at 45) stated that the second district court order did not reach the *Turkette* issue. The confusion is caused by an ambiguity in the district court's second ruling that collapses the separate structure requirement with the separate identity requirement. *See* Pet. App. 27a. But there is no question that the first district court ruling squarely addresses the *Turkette* issue, no question that our appellate brief preserved the *Turkette* issue, and no question that the decision below finds these allegations sufficient to state a RICO "enterprise."

2. Respondents next suggest (at 11) that the allegations in Paragraph 167 of the Second Amended Complaint satisfy the separate structure requirement imposed by five circuits. To be sure, that paragraph includes the words "separate structure." But reciting the words is not what matters. As the district court explained, the substance of this "separate structure" allegation is simply the structure of NDS Group itself. (Pet. App. 28a; *see also* Pet. App. 37a ("absolutely no alleged facts that, if true, would show an overarching control structure").) Respondents write that "NDS organized and managed each member of the Technology Enterprise" (Opp. 11), but that does nothing to show that the Technology Enterprise itself has a structure apart from the alleged racketeering activity. Without any structure separate from the alleged racketeering acts themselves, the Technology Enterprise cannot satisfy the "separate structure" requirement where it is imposed.

3. As the Ninth Circuit recently noted, there is a deep circuit split on whether this Court's decision in *Turkette* requires a RICO plaintiff to allege that the "enterprise" has a structure that is separate from that necessary to accomplish the alleged pattern of racketeering activity. *Odom,* 486 F.3d at 549-51. *See* Pet. 18-24 (describing five to four circuit split). Respondents do not dispute the circuits are severely divided on this statutory interpretation question. (Opp. 2 ("assuming a debate over the separate structure requirement").)

The interests of judicial economy warrant considering together the first and second questions presented by this petition. The statutory relationship between "person" and "enterprise" and "enterprise" and "pattern of racketeering activity" both turn, critically, on the meaning and purpose behind Congressional use of "enterprise" in the RICO statute. Resolving together the circuit court disarray on both questions conserves judicial resources while providing much needed guidance on the scope of the RICO statute.

III. THE NINTH CIRCUIT'S ADOPTION OF AN IDENTITY DISCOVERY RULE SHOULD BE SUMMARILY REVERSED

Our opening petition explained that the Ninth Circuit's statute of limitations ruling is so directly contrary to this Court's decision in *United States v. Kubrick,* 444 U.S. 111 (1979), that summary reversal is warranted. *See* Pet. 24-26. Respondents' two efforts to distinguish the decision below fail.

First, the purported "concession" at oral argument emphasized by respondents (at 14) is irrelevant to this case. The opinion states that counsel "conceded that, under both federal and California law, equitable tolling protects a plaintiff who does not know, and even exercising reasonable diligence could not know, who caused the harm that is the subject of the complaint." Pet. App. 2a-3a. The opinion omits, however, counsel's next sentence: "What distinguishes this case from [that] general statement of the law is that [Sogecable] unquestionably knew [the identity of NDS] within the statute of limitations." Nov. 14, 2006 Tr. at 25:40. Equity may indeed protect a plaintiff who cannot reasonably identify the defendant *before* the limitations period expires and thus does not have any prospects for bringing a timely suit. But that principle has no application here where the plaintiff identified the defendant well within the statutory period and thus had ample time to bring suit.

Second, the panel's resort to the "equitable tolling" nomenclature does not distinguish the case from *Kubrick. See* Opp. 14-15. In the panel's words, "the period of time" "is equitably tolled and added to the end of the limitations period." (Pet. App. 3a.) But the panel's ruling delays the start of the entire statute of limitations period.[8] (Pet. App. 4a.) Accordingly, it is the panel that "confuse[d] the accrual of a claim, which begins the statute of limitations, and the tolling of the limitations period, which suspends it." (Opp. 14.) In substance, the panel's ruling is undeniably contrary to *Kubrick*'s holding that statutes of limitations begin to run from the time that the injury is discovered. Summary reversal is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

EUGENIE C. GAVENCHAK
Deputy General Counsel
News America Inc.
1211 Avenue of the Americas
New York, New York 10036

DARIN W. SNYDER
(*Counsel of Record*)
O'MELVENY & MYERS LLP
275 Battery Street, Suite 2600
San Francisco, CA 94111
(415) 984-8846

MARK S. DAVIES
SUSAN M. MOSS
O'MELVENY & MYERS LLP
1625 Eye Street, NW
Washington, DC 20006

August 28, 2007

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[8] Specifically, the panel held that the statute of limitations did not *begin* to run until March 2002, when respondents learned that petitioners were allegedly behind the 1999/2000 distribution of counterfeit smartcards. In the panel's view, the three-year federal limitations period for circumvention claims ran from March 2002 to March 2005, and the two-year state limitations period ran from March 2002 to March 2004. (Pet. 3a.)

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No. 06-1648

IN THE

Supreme Court of the United States

NDS GROUP PLC; NDS AMERICAS, INC.
Petitioners,

v.

SOGECABLE, S.A.; CANALSATELITE DIGITAL, S.L.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

MICHAEL J. MUELLER
Counsel of Record
ANDREW DOBER
AKIN GUMP STRAUSS HAUER & FELD, LLP
1333 New Hampshire Ave., NW
Washington, DC 20036
Telephone: (202) 887-4000

JAN S. AMUNDSON
QUENTIN RIEGEL
NATIONAL ASSOCIATION OF MANUFACTURERS
1331 Pennsylvania Avenue, NW
Washington, DC 20004
Telephone: (202) 637-3000

Attorneys for Amicus Curiae the National Association of Manufacturers

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.2, the National Association of Manufacturers (NAM) moves for leave to file the attached brief *amicus curiae* in support of the petition. The Petitioner has consented to the filing of this brief. The Respondent has not, necessitating this motion. The petitioner's consent letter is on file with the Clerk of the Court.

The NAM is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media and the general public about the vital role that manufacturing plays in America's economic future and living standards.

The NAM has a great concern about RICO pleading standards that encourage strike suits against its members and stifle the ability of American businesses to operate efficiently across multiple jurisdictions. The NAM's members face numerous lawsuits from plaintiffs seeking to use the RICO statute as leverage against legitimate businesses merely because those businesses operate through subsidiaries and agents.

The NAM accordingly submits this brief in support of the petition because it presents an opportunity for this Court to decide whether an association-in-fact "enterprise" can be comprised of nothing more than a corporation and its subsidiaries and agents. The court considered, but did not rule on this same, important issue in *Williams v. Mohawk*

Indus., Inc., 546 U.S. 1075 (2005) (Pet. No. 05-465). Instead, the Court remanded the case in light of its intervening ruling on RICO's proximate cause threshold in *Anza v. Ideal Steel Supply Corp.*, 126 S. Ct. 1991 (2006). *See Williams v. Mohawk Indus., Inc.*, 126 S. Ct. 2016 (2006). The NAM filed a brief in support of the petitioners in *Mohawk* and continues to believe the issue is of great importance to the industry and merits this Court's attention.

With its brief, the NAM seeks to contribute to the Court's understanding of the harmful effect of the current state of RICO enterprise law on manufacturers. Accordingly, the NAM respectfully requests that the Court grant its motion for leave to file the attached brief *amicus curiae* in support of the petition.

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INTERESTS OF AMICUS CURIAE[1]

The National Association of Manufacturers (NAM) is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all fifty states. The NAM's mission is to enhance the competitiveness of American manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the general public about the vital importance of manufacturing to America's economic future and living standards.

The NAM often files amicus briefs in cases that are of great interest and consequence to manufacturers. Members of the NAM, as well as other organizations in their industries and trades, have been named as defendants in a number of private civil suits under RICO. The NAM files this brief to ask the Court to address the important and compelling issue of whether an "enterprise," as defined under the Racketeer Influenced and Corrupt Organizations Act (RICO), may consist solely of a corporate defendant and its subsidiaries and agents. Many of the NAM's members—and most American businesses—conduct their operations through subsidiaries and agents.

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[1] Pursuant to Supreme Court Rule 37.6, the Saint Barnabas Health Care System ("Saint Barnabas") made a monetary contribution to the preparation and submission of this brief. Saint Barnabas is one of many corporate defendants facing RICO suits involving association-in-fact enterprises composed solely of entities and agents within a corporate family. A civil RICO suit raising substantially the same issue presented in this petition was filed against Saint Barnabas in 2006. *See Longmont United Hosp. v. Saint Barnabas Corp.*, No. 06-cv-02802, 2007 WL 1850881 (D.N.J. June 22, 2007). The district court dismissed the suit because, *inter alia*, the enterprise consisted of nothing more than Saint Barnabas Corporation, its subsidiary hospitals and agents. *Id.* The case is currently on appeal before the Court of Appeals for the Third Circuit. *See Longmont United Hosp. v. Saint Barnabas Corp.*, No. 07-3236 (3d Cir. filed July 27, 2007).

In conflict with the majority of other appeals courts, but in agreement with two circuits, the Ninth Circuit has established a rule that will result in an increase in the number of businesses exposed to RICO liability. The NAM is concerned that the decision below, combined with the intractable circuit split, will encourage civil RICO strike suits against corporations and unduly hamper American manufacturers from expanding business operations into jurisdictions where they may be subjected to costly litigation and massive exposure.

This is the second time the NAM has filed an amicus brief on this important issue. The NAM filed a brief in support of the Petitioner in *Mohawk Indus., Inc. v. Williams*, 411 F.3d 1252 (11th Cir. 2005), *cert. granted, Williams v. Mohawk Indus., Inc.,* 546 U.S. 1075 (2005) (Pet. No. 05-465). After argument, however, the Court dismissed the writ as improvidently granted. *Williams v. Mohawk Indus., Inc.,* 126 S. Ct. 2016 (2006).[2] The irreconcilable split between the circuits that justified *certiorari* in *Mohawk* continues. As evidenced by the Ninth Circuit decision in the present case, the chasm grows wider with time. Lower courts are in need of this Court's guidance.

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[2] The Court remanded *Mohawk* in light of its ruling on another RICO issue in *Anza v. Ideal Steel Supply Corp.*, 126 S. Ct. 1991 (2006). *See Williams*, 126 S. Ct. 2016.

STATEMENT OF THE CASE

This petition raises important questions regarding the proper construction of the RICO statute's central liability provision, which makes it unlawful for a "person" to be "associated" with an "enterprise" engaged in a "pattern of racketeering activity." 18 U.S.C. § 1962(c). The Ninth Circuit's decision adds to the already confusing array of circuit court rulings on this issue, encourages RICO strike suits, and hinges potential RICO liability on the jurisdiction in which a particular corporation, or corporate family, operates.

The RICO enterprise pled in this case mirrors scores of RICO cases filed throughout the country every year. Petitioner NDS Group PLC ("NDS Group") was named as a RICO defendant in a suit filed in the Central District of California. The core allegation is that NDS Group conducted the affairs of a RICO enterprise consisting of itself, its wholly-owned subsidiary and its agents. The alleged purpose of the enterprise was for NDS Group to reverse engineer its competitor's computer chip to extract information and facilitate its publication over the internet. Once the information was published, third parties used it to create counterfeit products, resulting in financial harm to plaintiffs. The "technology enterprise" was identified as NDS Group, NDS Group's wholly-owned-subsidiary NDS Americas, Inc. ("NDS Americas"), and a group of employees and agents working for NDS Group. In short, the alleged "technology enterprise" is composed of the defendant corporation, its subsidiary and its agents (Pet. App. 5-6).

As described in detail in NDS's petition, the district court held that the Complaint failed to satisfy RICO's distinctiveness requirement (Pet. App. 7-9). The Ninth Circuit reversed because the "enterprise" consisted of two separate corporations—NDS Group and its wholly-owned subsidiary, NDS Americas—as well as the agents of NDS Group (Pet. App. 9-10). In the Ninth Circuit's view, this enterprise was distinct from NDS Group, the alleged RICO "person."

The pleading artifice deemed adequate to survive the motion to dismiss in this case has been utilized by plaintiffs in countless cases. While three circuits correctly recognize that an enterprise consisting solely of a corporation and its subsidiaries and agents fails to meet RICO's well established "distinctiveness requirement" (Pet. App. 16-18), the Ninth Circuit and two other circuits permit this pleading artifice (Pet. App. 12-13). Four circuits hold that a RICO person and its subsidiaries or agents sometimes constitute an enterprise (Pet. App. 13-16). The current schism in circuit court jurisprudence allows strategic plaintiffs to circumvent those jurisdictions which correctly hold that a RICO "enterprise" cannot consist solely of a corporate defendant and its subsidiaries and agents by bringing suit in a circuit with more permissive pleading standards. As explained below, the primary source of disagreement between the circuits stems from differing interpretations of the Supreme Court's decision in *Cedric Kushner v. King*, 533 U.S. 158 (2001).

REASONS FOR GRANTING THE PETITION

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE IRRECONCILABLE SPLIT AMONG FEDERAL APPELLATE COURTS OVER WHETHER A RICO "ENTERPRISE" MAY CONSIST SOLELY OF A CORPORATE DEFENDANT AND ITS SUBSIDIARIES OR AGENTS

NDS's petition correctly identifies a significant split among the federal appellate courts over whether an enterprise may consist solely of a corporate defendant and its subsidiaries or agents (Pet. App. 10-18). *Amicus* agrees with NDS's analysis of this split and briefly offers three additional reasons for why the Court should grant *certiorari* on this issue.

First, the split is an issue of great importance to the nation's business community. Numerous legitimate corporations face RICO suits every year solely because they conduct business through agents—whether employees, subsidiaries, or third-party contractors. Manufacturers, health care companies and other employers utilize subsidiaries and agents to enhance productivity and structure their businesses in the most cost-efficient manner possible.

According to the Administrative Office of the U.S. Courts, 840 civil RICO actions were filed in the year ending March 31, 2005 (of which eight were filed by the United States);[3] 695 in the year ending March 31, 2004 (of which four were filed by the United States); 845 in the year ending March 31, 2003 (of which ten were filed by the United States); 707 in the year ending March 31, 2002 (of which seven were filed by the United States). *See* Federal Judicial Caseload Statistics, Table C-2 (U.S. District Courts-Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit) for each respective year, *available at* http://www.uscourts.gov/library/statisticalreports.html (last visited Aug. 5, 2007). Although the Administrative Office does not keep track of which RICO cases involve corporate defendants, it is the experience of *amicus* that the vast majority of these cases have been filed against corporations. Furthermore, because the corporate defendant must be

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[3] The Administrative Office of the U.S. Courts has not posted statistics for 2006.

"distinct" from the enterprise under *Kushner*, 533 U.S. at 161, a large number of these cases involve creative allegations that the corporation is one member of an association-in-fact enterprise that includes additional entities or natural persons.

Second, the business community would benefit from a uniform rule stating that an association-in-fact enterprise cannot consist solely of a RICO defendant and its subsidiaries and agents. Many of the NAM's members operate in multiple jurisdictions. The current circuit split hampers the ability of businesses to structure their operations in a cost-effective manner while making it easy for plaintiffs to find a jurisdiction that permits these "oddly constructed entities." *Kushner*, 533 U.S. at 164-65. The split exposes American businesses to needless transactional and litigation costs based solely on the circuit in which they operate or, in many cases, based on the circuit in which creative plaintiffs choose to file suit.

Third, unlike issues raised in other writ seeking petitions, the viability of an association-in-fact enterprise consisting solely of a corporation and its subsidiaries and agents has been addressed and ruled on by virtually every circuit court and many district courts. As demonstrated in NDS's petition, the circuit split is severe and the question is ripe for resolution. *Cf. McCroy v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J.) (certiorari denied because issue required "further study" in lower courts "before it is addressed by this Court").

II. REVIEW IS WARRANTED BECAUSE THE DECISION BELOW IS IN CONFLICT WITH THE REASONING BEHIND THIS COURT'S DECISION IN *CEDRIC KUSHNER PROMOTIONS, LTD. v. KING*, 533 U.S. 158 (2001)

The resolution of conflicts between a Court of Appeals ruling and prior Supreme Court precedent is a compelling factor in favor of a grant of *certiorari*. *See* Sup. Ct. R. 10(c); Robert L. Stern et al., SUPREME COURT PRACTICE § 4.5 (8th ed. 2002), *citing United States v. Doe*, 465 U.S. 605, 610 (1984) (granting *certiorari* to "resolve the apparent conflict between the Court of Appeal's holding and the reasoning underlying the Court's holding in *Fisher*"), *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 926 (1982) (same), *Army & Air Force Exchange Service v. Sheehan*, 456 U.S. 728, 733 (1982) (same). The Ninth Circuit's ruling, and the jurisprudence of the Eleventh Circuit and Sixth Circuit, misinterprets the reasoning behind *Kushner*.

As set forth in NDS's petition, this Court has twice recognized the importance of resolving whether an "enterprise" can consist of only the RICO person and its subsidiaries or agents (Pet. App. 10-11). In *Kushner*, 533 U.S. at 161, the Court reversed a Second Circuit decision that held boxing promoter Don King could not be considered a RICO "person" under § 1962(c) with respect to the alleged "enterprise," his wholly-owned company. The Court, however, expressly differentiated cases involving combinations of a corporation, its subsidiaries, employees, and agents as an association-in-fact enterprise. Such cases involve "significantly different allegations" and "quite different circumstances." *Kushner*, 533 U.S. at 164-65. The Court cited *Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.*, 30 F.3d 339 (2d Cir. 1994) and *Discon, Inc. v. NYNEX Corp.*, 93 F.3d 1055 (2d Cir. 1996), *vacated on other grounds*, 525 U.S. 128 (1998), as examples of properly dismissed association-in-fact enterprises involving "oddly constructed entities." The Court did not "consider the merits of these cases," and noted "their distinction from the instant case." *Id.*

The majority of lower courts faced with "artfully pled" association-in-fact enterprises consisting of nothing more than a defendant corporation, its agents and subsidiaries, have correctly held that the pleading artifices deemed inadequate by the Second Circuit in *Riverwoods* and *Discon* remained inadequate after *Kushner*. *See Whelan v. Winchester Prod. Co.*, 319 F.2d 225, 229 (5th Cir. 2003) (no RICO enterprise when "a defendant corporation through its agents committed the predicate acts in the conduct of its own business"); *Baker v. IBP, Inc.*, 357 F.3d 685 (7th Cir. 2004), (allegations that the RICO person and its agents are enterprise are insufficient); *City of New York v. Cyco.Net, Inc.*, 383 F. Supp.2d 526, 548 (S.D.N.Y. 2005) ("Plaintiffs' reliance on *Kushner* is misplaced. The Supreme Court was careful to distinguish the facts in *Kushner* ... from other cases ... [i]n particular, ... *Riverwoods*."); *DTEX LLC v. BBVA Bancomer*, 405 F. Supp.2d 639, 651-52 (D.S.C. 2005) ("This case is not like *Kushner*, where there was an identifiable 'person' who was employed by the enterprise. Instead, this case is like *Riverwoods*: the so-called 'enterprise' cannot logically be separated from the person'"); *South Broward Hosp. Dist. v. Medquist, Inc.*, 2007 WL 1041684, *13 (D.N.J. March 30, 2007); *Longmont United Hosp. v. Saint Barnabas Corp.*, 2007 WL 1850881, *9 (D.N.J. June 26, 2007).

But a significant minority of lower courts incorrectly interpreted the Court's ruling in *Kushner* to reach the opposite conclusion. *See, e.g., Williams v. Mohawk Indus.*, 465 F.3d 1277, 1284 (11th Cir. 2006) (upholding association-in-fact enterprise comprise of RICO defendant and agents; "This Court has never required anything other than a 'loose or informal' association of distinct entities); *Living Designs, Inc. v. E.I. Dupont de Nemours and Co.*, 431 F. 3d 353, 361 (9th Cir. 2005) (corporation is formally separate and distinct from its agents); *Kirwin v. Price Commun. Corp.*, 391 F.3d 1323, 1327 (11th Cir. 2004); *State of Florida v. Tenet Healthcare Corp.*, 420 F. Supp.2d 1288, 1305-06 (S.D. Fla. 2005) (RICO "enterprise" consisting of corporate defendant its subsidiaries and agents was viable because "in recent years, both the Supreme Court and the Eleventh Circuit have held that the existence of a legal distinction between the RICO defendant and the RICO enterprise is sufficient to establish an enterprise under RICO.").

The importance of addressing this issue was confirmed when the Court granted *certiorari* in *Mohawk Indus., Inc. v. Williams*, 411 F.3d 1252 (11th Cir. 2005), *cert. granted, Williams v. Mohawk Indus., Inc.*, 546 U.S. 1075 (2005). The question presented was whether "a defendant corporation and its agents can constitute an 'enterprise' under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 ('RICO')." Pet. No. 05-465. The NAM filed an amicus brief in support of the petitioners in *Mohawk* advocating a bright line rule excluding corporations from the definition of an "association-in-fact" enterprise. After argument, however, the Court dismissed the writ as improvidently granted and remanded the case in light of its decision in *Anza v. Ideal Steel Supply Corp.*, 126 S. Ct. 1991 (2006). *Williams v. Mohawk Industries, Inc.*, 126 S. Ct. 2016 (2006).

This issue continues to be of great importance to the manufacturing industry and corporations in other business sectors, many of whom operate in multiple jurisdictions and are subjected to civil RICO suits merely because they operate through subsidiaries and agents. The NAM respectfully submits that the nation's business community is in need of a clear, uniform rule clarifying an issue several courts believe was left unresolved in *Kushner*. Clear statements of legal norms are particularly important where the norms affect commonplace business transactions, because the costs of repeated inefficient transactions, economically distorted business practices, and foregone commercial opportunities can accumulate rapidly. *See* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 621 (1992). In the area of state use and sales taxes, for instance, this Court has observed:

> Th[e] artificiality [of a bright-line rule], however, is more than offset by the benefits of a clear rule. Such a rule firmly establishes the boundaries of legitimate state authority to impose a duty to collect sales and use taxes, and reduces litigation concerning those taxes .... Moreover, a bright-line rule in the area of sales and use taxes also encourages settled expectations, and in doing so, fosters investment by businesses.

Quill Corp. v. North Dakota, 504 U.S. 298, 315-16 (1992). A concurrence by four Justices of this Court recognized that "clarity and predictability in RICO's civil applications are particularly important" and that "RICO, since it has criminal applications as well, must even in its civil applications, possess the degree of certainty required for criminal laws." *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 255 (1989) (Scalia, J. concurring) (criticizing this Court's ruling in *Sedima S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985), for creating "years" of litigation and "countless millions in damages and attorney's fees").

As many courts of appeals have recognized, the use of agents, employees and subsidiaries to accomplish corporate ends is not merely a commonplace practice, it is a necessity arising from the incorporeal nature of the corporate entity. *See Fitzgerald v. Chrysler Corp.*, 116 F.3d 225, 227

(7th Cir. 1997); *Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.*, 30 F.3d 339, 344 (2d Cir. 1994); *Brittingham v. Mobil Corp.*, 943 F.2d 297, 301 (3d Cir. 1991). Neither the RICO statute, nor the Supreme Court's decision in *Kushner*, were intended to subject legitimate businesses to racketeering liability merely because they conduct business through subsidiaries and agents. Yet that is precisely the situation that now exists under the jurisprudence of the Ninth, Eleventh, and Sixth Circuits.

Indeed, the distinctiveness requirement "would be eviscerated if a plaintiff could successfully plead that an enterprise consists of a defendant corporation in association with employees, agents, or affiliated entities acting on its behalf" because it would turn every act of alleged corporate wrongdoing into a RICO action. *Brittingham*, 943 F.2d at 301 (dismissing RICO complaint for failure to satisfy distinctiveness requirement). The NAM has a strong interest in avoiding this result. The allure of treble damages combined with overwhelming discovery costs in RICO suits will produce a groundswell of new RICO litigation against legitimate corporations merely because those corporations operate through subsidiaries or agents. The RICO statute was enacted to protect legitimate businesses from criminal misuse and to facilitate the prosecution of organized crime. *Kushner*, 533 U.S. at 162; *United States v. Turkette*, 452 U.S. 576, 584 (1981). RICO was not intended to subject legitimate business entities to such draconian exposure merely because they operate through subsidiaries and agents.

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

MICHAEL J. MUELLER
Counsel of Record
ANDREW DOBER
AKIN GUMP STRAUSS HAUER & FELD, LLP
1333 New Hampshire Ave., NW
Washington, DC 20036
Telephone: (202) 887-4000

JAN S. AMUNDSON
QUENTIN RIEGEL
NATIONAL ASSOCIATION OF MANUFACTURERS
1331 Pennsylvania Avenue, NW
Washington, DC 20004
Telephone: (202) 637-3000

Attorneys for Amicus Curiae the National Association of Manufacturers